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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1915.

VOLUME XCVIII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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By Harry C. Lindsay, Reporter of the Supreme Court,
For the benefit of the State of Nebraska.

MAR 9 1915

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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[1] Resigned October 15, 1915.
[2] Appointed October 16, 1915.

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NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Johnson, Nemaha, Pawnee and Richardson.	John B. Raper.....	Pawnee City.
Second.....	Cass, Otoe and Sarpy....	James T. Begley....	Papillion.
Third.....	Lancaster.....	Albert J. Cornish....	Lincoln.
		P. James Cosgrave...	Lincoln.
		Willard E. Stewart...	Lincoln.
Fourth.....	Burt, Douglas and Washington.	George A. Day.....	Omaha.
		James P. English....	Omaha.
		Lee S. Estelle.....	Omaha.
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		Willis G. Sears.....	Tekamah.
		Alexander C. Troup..	Omaha.
Fifth.....	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran...	York.
		Edward E. Good.....	Wahoo.
Sixth.....	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Frederick W. Button	Fremont.
		George H. Thomas...	Schuyler.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Dakota, Dixon and Thurston.	Guy T. Graves.....	Pender.
Ninth.....	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne	Andrew R. Oleson...	Wisner.
		Anson A. Welch.....	Wayne.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
		James N. Paul.....	St. Paul.
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Fourteenth...	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Ernest B. Perry.....	Cambridge.
Fifteenth.....	Boyd, Brown, Holt, Keya Paha and Rock.	R. R. Dickson.....	O'Neill.
Sixteenth.....	Box Butte, Cherry, Dawes, Sheridan and Sioux.	William H. Westover	Rushville.
Seventeenth..	Banner, Garden, Morrill and Scott's Bluff.	Ralph W. Hobart....	Mitchell.
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IN MEMORIAM

CONRAD HOLLENBECK

At the session of the Supreme Court of the State of Nebraska, April 5, 1915, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable John B. Barnes, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Jacob Fawcett, Honorable Samuel H. Sedgwick, and Honorable Francis G. Hamer, Associate Justices, the following proceedings were had:

May It Please the Court:

Your committee, appointed to prepare and report resolutions in memory of the late Chief Justice Conrad Hollenbeck, respectfully submit the following:

Whereas, on the 21st day of January, 1915, the Honorable Conrad Hollenbeck, who less than a month before had taken the oath of office and entered upon the duties of Chief Justice, was removed from the scene of his earthly activities, and

Whereas, it is fitting that his learning as a lawyer, his fidelity and efficiency as a public servant, and his rugged virtues as a man should receive formal and solemn recognition by this Court, therefore,

Resolved, That we profoundly regret that the Honorable Conrad Hollenbeck was permitted to wear for so short a time the honors pertaining to the office of Chief Justice of this Court, which he had well earned by a life of rectitude and devotion to duty:

That in his death the bar lost an able and honorable member; the bench, a learned and just judge; and the state, a useful and exemplary citizen.

That these resolutions be entered at length on the records of this court, and that the clerk be directed to transmit a copy of the same to the widow of the deceased.

I. L. Albert,
A. M. Post,
George L. Loomis.

JUDGE I. L. ALBERT:

May It Please the Court: In presenting the foregoing resolutions in memory of the late Chief Justice Hollenbeck, it would seem proper to present therewith a short sketch of his life and character.

Conrad Hollenbeck was born at Hebron, Potter county, Pennsylvania, on the 19th day of November, 1847. In the spring of 1864, at the age of sixteen, he enlisted as a private in the Two-hundred Seventh regiment of Pennsylvania volunteers, and with his regiment participated in all the battles of the army of the Potomac, from the Battle of the Wilderness to the surrender at Appomattox. After his discharge from the army, he entered Mansfield College, Pennsylvania, from which he graduated in 1869. He then took up the study of law, and was admitted to the bar in 1871, and for about six years practiced his profession in Coudersport, Pennsylvania. He was a member of the Legislature of Pennsylvania in 1874 and 1876. On the 9th day of May, 1877, he was married to Miss Janett Knox, and, leaving his native state, took up his residence in the same month at Fremont, Nebraska, where he continued to reside until his death. In 1890 he was elected County Attorney of Dodge county and served in that capacity until 1895. In 1898 he was elected Judge of the Sixth Judicial District of Nebraska and held that office continuously thereafter until January, 1915, when he resigned to take the office of Chief Justice of this Court, to which he had been elected at the general election in 1914. He died January 21, 1915, having served but three weeks of his term.

As a soldier, he was brave and ever ready to respond to the call of duty. As a legislator, he was reckoned among those who could be depended upon to act wisely, uninfluenced by personal considerations. As a practitioner, he was able and conscientious and true to the best ideals of the profession. Through all the mazes and intricacies of the relations of the attorney to his clients and the court, he threaded his way without once finding his feet on doubtful ground. As a judge, he was fearless and impartial. He weighed carefully, but, when the time for decision came,

moved confidently. While seemingly slow in his mental processes, few could grasp more readily or discern more accurately the real points in a controversy. He was more of a student than a reader; more given to reflection than to research. But his record as a judge leaves no room for doubt that he had drank deeply at the fountain heads of the law. He was a man of broad sympathies, kindly in his dealings with his fellow men, and charitable in his judgments. He was easy to approach, but there was that in his bearing which forbade undue familiarity. The people trusted him implicitly. While many litigants left his presence disappointed, no one ever went away with any doubt that he had received the benefit of his best judgment.

Fulsome praise and finely polished sentences, were they at my command, would be out of place in speaking of a man like Judge Hollenbeck. His is one of those fine characters that words of praise cannot embellish nor words of criticism mar.

The foregoing resolutions are offered as a slight tribute to the memory of Conrad Hollenbeck, late Chief Justice of this Court, who, in the course of his life, proved himself a gallant soldier, a wise lawmaker, a just judge, and a worthy man.

HONORABLE GRANT G. MARTIN:

May It Please the Court: I knew Judge Hollenbeck intimately for twenty-five years. I knew him as a man, a friend independent of and separate from his professional career. His was a genial, affable, generous nature. These characteristics seemed to draw to him all classes of men. His office was a sort of community Mecca where the young lawyer and law student went for encouragement; where the poor and downtrodden went for help and advice in personal matters; where the more fortunate of the community sought counsel on questions of public welfare. In him they found one devoid of impetuous, dictatorial, and domineering qualities, but they also found a man wonderfully gifted with mental equipoise, one cool and deliberate, yet open and sympathetic. I have never known another

who, seemingly without effort, made so many friends in the circle in which he moved and who held his friends to the last. In his private practice he was pre-eminently the poor man's lawyer.

I knew him as a public prosecutor for four years. In a county of over twenty thousand people he was vigilant and fearless in prosecuting offenders, but in the conduct of criminal cases he seemed to be guided by a determination to learn the guilt or innocence of those charged with crime. I do not think he ever asked for the conviction of a man whom he believed innocent, even when popular clamor or prejudice demanded it. This I regard as the highest duty of a public prosecutor.

I have heard some men characterized as natural trial judges. If such there are, he belonged to that class. Nature had abundantly endowed him with a judicial temperament, a powerful intellect. In judgment of men and things he excelled. In the business of the court, when possible, he called to his command those great equitable principles which are said to be the foundation and glory of our law.

JUDGE J. R. DEAN:

May It Please the Court: To your Honors and to the distinguished gentlemen of the Committee having in charge this memorial service, I am truly grateful for the opportunity your invitation gives me to join publicly in paying a brief tribute of respect to the high character of your late distinguished associate, a man whom in life we all loved, and whose memory a bowed and stricken state reveres.

For the second time in the history of our state death has removed a Chief Justice of the Supreme Court while holding that exhalted office. It is only in recent years that I came to know the late Chief Justice Conrad Hollenbeck at all intimately. But for almost twenty years I have known of the splendid reputation that he bore in his home county, and in his home judicial district, where he was so many times and so signally honored by election to public office; first as public prosecutor, an office that among law-

yers often marks the beginning of a public career; and then as district judge for sixteen consecutive years. In both capacities he served his constituents with that distinguished ability that marked all of his public service. But it was on the bench that his genius found its best expression, and it is on the work he did there that his fame securely rests.

The popular conception of a judge is that he is a relic of the past. Indeed there are some who would have you believe that he is an individual who has survived the ages from remotest antiquity. It is believed by many that in his interpretation of the law the judge is governed by its letter, and that he altogether ignores its spirit; that he so delights in the laws' technicalities, out of which have grown in part its delays and many unjust oppressions, that he loses sight of the substantial rights of men, whether those rights pertain to life, liberty or property. It has come to be believed by some that to be in good and regular standing as a judge the gaze must be fixed for the most part backward; that the judge's horizon is at his back; that he must live and move and have his being in the murky mists of the lower ground and among the tombstones of the past; that a lookhout ahead is to be desired in every calling and in every legitimate human activity, except in the practice of the law and in its interpretation and in its application to human affairs; that man was made for the law; that the early interpretations placed thereon under conditions differing vastly from present conditions are unchangeable, and that it is sacrilegious, and perhaps treasonable, to hold to any other view. I have not said these views express the true conception of the judicial office, but merely the popular conception. But how far removed from the popular conception of the judicial office, as here depicted, was the late Chief Justice Hollenbeck.

In the long ago there was a philosophic observer who said: "Four things belong to a judge: To hear courteously, to answer wisely, to consider soberly, and decide impartially." I submit your Honors, and my brethren of the bar, that the judicial career of the man whose memory

today we honor met these requirements in full and heaping measure.

Conrad Hollenbeck was a just Judge. But he was more than a judge. He was a man who did not wander aimlessly about in the winding pathway of legal lore. He looked to see where justice led, and that determined direction for him. He humbly followed in the footsteps of the Master, whom we are taught to believe was touched with a feeling of our infirmities. Judge Hollenbeck was learned in the law. And he was not only learned in the law, but he was a master in the interpretation and in the application of the spirit of the law. He did not seek asylum in the laws technicalities, nor did he tolerate them in those who practiced before him. He was in entire accord with the pronouncement of that greatest advocate of the ages who, in speaking of the law, said: "The letter killeth, but the spirit giveth life."

A few weeks before his untimely death, if in the Divine plan there be such a thing as untimely death, I met the Judge by appointment at a neighboring town. It was in December of last year, and it was the last time that we met. The object of our meeting was soon accomplished. We then engaged for a little while in social converse. He talked a little about some of the plans he had in view with respect to his work that was about to begin as one of the judges of the Supreme Court. He then became reminiscent, and he talked tenderly about his friends and those who were endeared to him by the ties of many years. He dwelt upon his close relationship with the good people of his district among whom he had lived and labored for so long a time, and, as he talked, I thought I could detect a tone of sadness in his expressed thought that those relationships were soon in part to be severed. As I listened to his voice and looked into his kindly face, his words seemed to me like a benediction.

This man was a veteran of the Civil War. At its close he was an honorably discharged soldier, and he was then only nineteen. In my home town lives Melvin Hagadorn, a veteran and a comrade of the late Chief Justice in that

war. He told me only a few days ago that when Conrad Hollenbeck enlisted there were those who urged him, on account of his extreme youth, to remain at home. To all entreaties he replied: "Lincoln has called me to the front. There is a place for me on the firing line that I must fill. If I remain at home it will be vacant. No man can take the place of another when duty calls to fight in defense of the flag." How well the soldier boy bespoke the man matured. But Conrad Hollenbeck was more than a soldier; he ruled his own spirit, and we are told that a man who can do that is greater than a man who takes a city. It has been said of him that in a marked degree he was strong-willed. He was strong-willed, but that strength of will he nobly exercised in control of himself. It is for us to emulate his virtues and glory in the strength that was perfected in him.

We are assembled, not alone to mourn, nor alone to bestow fulsome praise upon the departed, but to learn lessons from his life of service, to the end that we too may make our lives worth living. The career of Conrad Hollenbeck is an inspiration; it ought to be; it is an incentive to honorable achievement. As he is now recalled to memory, I know I saw in him some of the qualities that are common to men who have become honorably prominent in the world's work. He was a modest man. He exercised the virtue of patience. The trumpeting of the noisy egotist, vain glorious and self-centered, was to him distasteful. He was plain in speech, in manner, in appearance, and even in the garb he wore. Here was a man lacking in lavish outward adornment, whom the people delighted to honor. The people always delight to honor a man who honors himself and his position by keeping faith with them. The trickster, the tinseled charlatan, may by caprice or by accident attain to high position, but the people do not honor them. They merely endure them.

What a living mystery is man! Some one has said his span of life is compassed in this brief expression: "He lived, he loved, he toiled, he disappeared." We know that mortal man is here today, tomorrow he is but a memory,

may be of good report, may be of ill. So true it is: "Their works do follow them."

When Judge Hollenbeck was in his prime, how strong and massive he appeared, in mind how vigorous. And yet so gentle was his nature that often he was moved to tears by the story of distress. But he was not content alone to give the outward sign of sympathy, the spoken word of cold condolence. He was not of those who looked on the plight of the unfortunate, and, shaking the head, passed by on the other side. He was of those who are compassionate, and give of their time and of their means to relieve the distress of those who fall by the wayside. Time fails me to speak of all the virtues of this manly man. The few that in a faltering manner are here recounted were known to me while yet he lived, but through all the years I maintained a stoic silence, and now that God's finger has touched his heart and it is still, I bring at this late hour a feeble tribute to his memory and reverently lay it on his tomb.

It is altogether fitting that this grateful service should be held during the Easter season when the silent miracle of life springing from the bosom of apparent death appeals to our every sense. The annual resurrection that we observe in nature in the springtide of the year leads our minds to meditate upon the influence that brings this phenomena to pass, and, as one has said, we "look through nature up to nature's God." We are led, then, to believe that, if for bud and blade and leaf there is life after death, for man, with all his hope, his aspiration, and his longing to live again, there too is a resurrection. Let this be the thought of our minds, the language of our hearts: "I know that my Redeemer liveth."

To human sight, to human sense, the passing of the beloved Chief Justice bears almost the mark of tragedy. But can the finite mind fathom the Infinite? "Canst thou by searching find out God?" Let us not forget there is a Divine hand that holds in its grasp the destinies of men and of worlds. Let us be content. Let us be reconciled to the Divine decree. Let us believe that, when the light of his life went out in the deepening darkness of dissolution, on

the further shore the light of the eternal morning rested on his wasted brow.

HONORABLE FRANK D. WILLIAMS:

May It Please the Court: Judge Conrad Hollenbeck began his public career with his election as District Judge of the Sixth Judicial District of Nebraska in 1898. It was in that position that he developed those qualities that later qualified him for the highest judicial position in the State. When he retired from the actual practice of the law and entered upon his duties as District Judge, he was in the prime of his vigorous manhood, a strong and sturdy character. Nature had done much for him. He was large of stature, had great mental power, and a fine sense of justice, inherently honest, and endowed with a full measure of common sense. He was unusually well-grounded in legal principles, and early gave evidence of having read with understanding the fundamental principles of the law. He was blessed with retentive memory, given much to reflection, fine mental poise, and of a judicial bent of mind. He soon learned that his place was of the judiciary, and, with singleness of purpose, he devoted many of the best years of his life to that work. He was not a bookish man, but he was a good judge of men, and possessed of unusual power of analysis, and had the rare faculty of being able to eliminate nonessentials, and with almost unerring judgment point out with clearness and precision the vital issues in the controversy. It was in the District Court work that he was his best. Modest, unassuming, and soft-spoken, yet coupled with an ever present dignity, the work moved smoothly along in an orderly manner, and with accuracy and dispatch. While District Judge he presided at many important trials, impressing those with whom he came in contact with his power to grasp the matters in controversy. When these contests were at their height he never failed to retain full command of the situation. And in the tensest moments, when life, liberty or property hung in the balance, he was the same patient, kindly Judge, free from bias and free from prejudice. Among the older members of the

bar of his District are some of the most capable lawyers of the middle west. These men often met as opposing counsel in his Court. On their part they were outspoken in admiration of his ability. On his part he took a personal interest in their success and was proud they were of his District. Lawyers of learning and experience say it is very doubtful whether his superior as a District Judge has occupied that position in this State. Men intuitively trusted him. The Legislature of 1911 attached Boone county to his District, and he was so well received that when the next general election took place he was elected without opposition.

For some time he had under advisement the wisdom of being a candidate for Chief Justice of this Honorable Court. Ill health deterred him in the early part of 1914, but he finally filed for the place in the state-wide primary campaign, and was chosen as one of the two candidates in the general election of 1914. The result of that contest was his election. In the counties of Boone, Platte, Colfax, Dodge, Nance, and Merrick, comprising his Judicial District, he received 11,764 votes, and his opponent received 3,357 votes. This expression of confidence on the part of his voters was a wonderful tribute to the man, and touched him deeply. Few men in this state have lived to receive such a gratifying testimonial at the hands of the voters. It was indeed a refutation of the too oft-heard statement that the electorate is ungrateful for the services rendered it by its public men.

In his intercourse with men he was uniformly kind and courteous. He never indulged in senseless criticism of his fellow men, but was quick to recognize the worth of those who may have differed from him. Judge Hollenbeck's life was like an open book. His friendship was wholesome and radiated good cheer, and he was in truth a manly man. In person, he had few of the graces of the courtier or of the frequenter of the drawing room, but he was rich in his love for his home, his family, and his friends.

On being elected Chief Justice, he viewed its duties with grave concern, and appreciated its responsibilities. He

brought to it the benefit of his long experience and ripened judgment, which would have been of real and lasting value to this Court. A few days before he took his seat he came to the capitol, weakened in body, but strong in the hope that he might be spared to do his work; but the change in his simple habits, together with the strain incident to his assuming his official duties, was too great a burden, and a higher Judge decreed that the silver cord should be loosed, and on the 21st day of January, 1915, Chief Justice Conrad Hollenbeck, like a tired child, passed into a peaceful sleep from which there was no awakening. By his death, his beautiful home life was broken. By it, the State lost a valuable citizen, and this Court one of its strong members.

We bid the good friend, the kindly Judge, farewell, and leave him, with an abiding faith that he has returned to the Creator who gave him life.

HONORABLE T. J. MAHONEY:

May It Please Your Honors: The occasion suggests reflection upon life, upon fame, upon service to mankind. The conspicuous place one may occupy in life, or the importance which history may attach to his career, is not always a true measure of his work or his service. Fame is often the outgrowth of accident, while worth and really meritorious service are ofttimes unnoticed. Against the few who are placed upon the pinnacle are the many who build the eminence. But the so-called "mute inglorious Milton," though often mute, is likewise often really glorious. We are prone to worship him who has wrought in the spot-light and whose achievements have redounded to the glory of the state, but we are all too apt to forget one whose life has been wanting in notoriety, though his labors may have yielded a greater contribution to the welfare of his fellows.

In some parts of the world, the power, the prestige, the glory of the state is everything, to which all considerations of personal happiness and individual well-being must be subordinated. Under such a régime, the function of

the people is the aggrandizement of the state. With us the function of the state is the individual well-being of its inhabitants, and whoever, in the discharge of public duty, contributes to that end is great, though he may not be famous.

Though he died the occupant of the highest position in the judicial system of our commonwealth, Conrad Hollenbeck's place in the history of the Nebraska judiciary must depend upon the discharge of his duties on the *nisi prius* bench. And, let it be remembered, the duties of that position are not mean. Whoever is called upon to administer justice between man and man, to vindicate the majesty of the state in the enforcement of her laws, but, most of all, to shield the unfortunate, and even the criminal, against a wrongful exercise of the state's great power—to that man are committed prerogatives so nearly approaching the authority of Omniscience that, if the necessities of human government did not compel the vesting of such power, we would stand aghast at its assumption by any mortal. Yet such is the power that organized society has found it necessary to commit, not merely to the courts of last resort, but to the *nisi prius* judges. Some parts of their work are subject to review, to modification, to correction, by the reviewing court, but justice without delay, justice that is free from bias, from considerations of person, justice tempered by mercy and unmixed with vengeance must depend in great measure on the trial court.

Whoever performs well the duties of such an office may not be conspicuous, but he is truly great. Such a man was Conrad Hollenbeck. He possessed a powerful intellect, a broad and true grasp of the law, an acumen that penetrated the subtle sophistries of the casuist, and, above all, a moral sense that is so often an unerring guide to a result that is just as well as lawful. He possessed the judicial temperament and remained serene and undisturbed in the midst of forensic battles that sometimes threatened to convert the temple of justice into an arena of oratorical gladiators. His impulses were generous and kindly. His voice was mellow and his speech deliberate. He bowed

without reluctance to the mandates of the law, but he always regarded the judicial tribunal as an institution for the furtherance of justice, rather than as affording an opportunity for the triumph of the most skilful.

By his career as a district judge, he inculcated reverence for the law and respect for individual rights. He cultivated a moral tone in the profession and among the people of his district. The impulses for good that sprang from his career do not end with his life, but will be perpetuated and multiplied and will continue to bring forth good fruit among many who did not have the happiness of his acquaintance. In this way, his influence is immortal. Such men do not die. What they wrought in their day, and according to their opportunities, will continue from generation to generation to enrich humanity, to purify and sweeten life, to mitigate the sorrows of the afflicted, and to lighten the burdens of those who are weary and heavy laden.

HONORABLE GEORGE L. LOOMIS:

May It Please the Court: I came here without a thought of attempting to add anything to the report of the committee, or to what might be more eloquently said by other members of the bar, and yet it is suggested to me that, inasmuch as I enjoyed a longer, and perhaps more intimate, acquaintance with Judge Hollenbeck than any other attorney, I ought not to let the occasion pass without adding something of perhaps a more intimate and personal nature.

It was my good fortune to locate at Fremont in August, 1876. The same fall came Judge William Marshall, and the spring following, Judge Hollenbeck. For one or two years after his coming, Judge Hollenbeck officed with me; we were office-mates, daily associates, and soon warm friends. Being both newcomers, and to some extent inexperienced, we were not overburdened with legal business, and had plenty of time to talk politics and law. Naturally we soon became familiar with each other's manner of thought, reasoning and investigation concerning legal questions.

In January, 1887, I became county attorney, and served four years, to be followed by Judge Hollenbeck for the next succeeding four years. I was both associated with him, and opposed to him, in the trial of important cases, as well civil as criminal. In practice he was eminently fair. I never saw about him even a suggestion of anything in the nature of trickery or sharp practice; nor did I ever know him to try to cover or suppress any feature of a case that court or jury ought to know as an aid to reaching a just decision. His ideas of the duty and responsibility of an attorney were in harmony with the best ideals of the profession.

To Judge Albert belongs the credit of placing Judge Hollenbeck on the bench. Judge Albert was serving as district judge by appointment, and was a candidate for the nomination and election to succeed himself. The two conventions—that of the People's Independent party of which he was a member, and that of the Democratic party of which Judge Hollenbeck was a member—met on the same evening at Columbus. A majority of each was in favor of uniting on a candidate. For some reason—I never knew why—his convention refused to honor itself by nominating Judge Albert, although he had proved himself an able and satisfactory judge. The Democratic convention favored Judge Albert. The contest continued until long after midnight, when Judge Albert, seeing that he could not win, threw his strength to Judge Hollenbeck and gave him the nomination, which was quickly and unanimously concurred in by the other convention. It was greatly to the credit of Judge Albert that he made such an unerring choice of a successor on the bench, and equally to the credit of Judge Hollenbeck that as able a judge as Albert should select him from among the many able lawyers of the district as the one best fitted for the place, even though his home was in the same city with Judge Marshall, who was then the other district judge.

I well remember an incident that occurred the next forenoon while standing with others in the street near the depot at Columbus waiting for a train home. A sturdy

farmer—I never knew his name, I wish I did—came up to me and asked whom we had nominated. I pointed out Judge Hollenbeck, who stood half the street's width away. He walked around to where he could get a good, unobstructed view of Hollenbeck's face, stood and studied him for a little until apparently satisfied, then came back to me and said: "Well, he looks to me like an honest man." And that is the way he looked to every one. There was something about him that impressed people with the conviction that he was honest. Lawyer and litigant, winner and loser, all left his court with the feeling that they had at least had the benefit of his honest, unbiased judgment.

I have heard the most groundless and unjust criticism of our courts. I have heard it from laymen, and, I regret to say, attorneys as well go to the extent of questioning, not only the ability, but the very integrity, of the court itself; but I have never known the miasmatic breath of cruel suspicion to be breathed against the personal or judicial probity of Judge Hollenbeck.

In these days when criticism of our courts is altogether too common and popular, when it strikes at the very life of our judicial system by tending to breed distrust in the minds of the people, and shake their confidence in the integrity of the courts, it is an armor of defense if we can point to the personnel of the court, to the judges, individually and collectively, and say the blighting breath of suspicion has never been, and cannot be, breathed against them.

It has been said of Judge Hollenbeck that he was not a great student. This depends upon the sense in which we use the word "student." If we restrict its meaning to the study of books and exclude every other means of study and source of information, I grant you he was not a great student. But, if used in its broader and truer sense as including original investigation, observation, thought, and the pursuit of information through sources other than printed pages, then Judge Hollenbeck was a student. One who arrives at the truth through the exercise of his own mental faculties, power of concentrated thought, clear an-

alytical reasoning, correct deduction, is certainly no less a student than one who reaches the same goal by following a printed guide. One may study nature in the fields and forest, he may study chemistry in the laboratory, astronomy under the starry canopy of the heavens, or complex questions in the solitude of his office, in the workshop of his own mentality, and if he discover the truth, if he reach a true and just conclusion, who would deny that he was in fact a student.

Judge Hollenbeck was more of a thinker than a reader. He would sit for hours with his mind intently fixed upon some question under consideration. He would examine it from every point of view suggested by attorneys; but he would study it in the light of accepted principles of law and justice, and his decision, when reached, must, in his mind, square with them. Given a correct premise from which to start, he could "think without confusion, clearly," in other words, could think along a straight line, could draw correct deductions from conceded facts, and he seldom failed to reach a correct conclusion.

I regarded Judge Hollenbeck as one of the greatest equity judges I have ever known. In this, his great strength lay in his deep sense of right and wrong, his thorough grounding in the fundamental principles of equity, his mental and moral integrity, and, by no means the least, his power to judge of men, to look through a witness, so to speak, and determine with almost unerring certainty whether he was telling the truth. Any purpose of a witness to evade the truth, or to testify otherwise than with perfect frankness and sincerity, could not escape detection by him. In his power to judge of the truthfulness of a witness, and of the weight that his testimony was entitled to, I have never seen his superior. To say that a man is infallible in any field is to ascribe to him more than human powers, but in this particular I think Judge Hollenbeck was as nearly infallible as it is reasonably possible for a judge to be. His ability to trace the thread of truth through a maze of contradictory evidence was indeed remarkable.

As a lawyer he was a credit to the profession; as a judge he was an honor to the bench. In his death, which seems

too untimely, the state has lost an experienced jurist of unquestioned ability and integrity just as he had entered upon the broadest field of usefulness open to a member of the bar—that which lies before the Chief Justice of our highest court. We who knew him best will remember him longest, and most keenly regret his loss.

HONORABLE ANDREW M. MORRISSEY, C. J.:

While yet a young man at the bar, it was my good fortune to become acquainted with Judge Hollenbeck. From the beginning of that acquaintance till the close of his life I knew him intimately and well. He was a man of unimpeachable character, faithful, earnest, honest. He indulged neither frills nor foibles. He was gentle, affable, and easy of approach, but, notwithstanding his simplicity and modesty, as a judge he was firm, forceful, and efficient. He reasoned accurately, ruled firmly, and in his court justice ever held the lighted torch. Of him it may well be said:

"None knew thee but to love thee
Nor named thee but to praise."

BY THE COURT:

As a tribute to his memory, it is ordered that the resolutions presented and remarks made be spread upon the records of the court, and published in the reports.

ANDREW M. MORRISSEY,
CHIEF JUSTICE.

IN MEMORIAM

ALLEN WESCOTT FIELD.

At the session of the Supreme Court of the State of Nebraska, November 1, 1915, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable John B. Barnes, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Samuel H. Sedgwick, and Honorable Francis G. Hamer, Associate Justices, the following proceedings were had:

May It Please the Court: The undersigned, members of the committee to whom was assigned the duty of preparing and presenting resolutions in memory of Honorable Allen Wescott Field, deceased, beg leave to submit the following report:

On June 9, 1915, all that was mortal of Allen Wescott Field passed from among us, but his life remains as a comfort and inspiration to all who knew him.

In 1864, when but a lad, he settled with his parents on a homestead overlooking this city, in the then territory of Nebraska. The privations of a primitive life aroused his youthful ambition, and excited a longing for a broader field of work and influence. He hungered for mental equipment and training, qualifying him to participate in moulding and shaping the development of the new state. Thus inspired, he was among the first to enter the University of Nebraska. Here he won honors and was recognized as a leader in the various activities of college life. He graduated with the class of 1877, and was subsequently awarded honorary degrees.

He chose the legal profession, for which he immediately began careful preparation, and soon made a practical application of the knowledge acquired by serving acceptably as a Justice of the Peace. He was admitted to the bar in

1878, and at once entered upon active practice of his profession. Possessed of an active mind and strong convictions, with an energetic delivery as a speaker, he made rapid progress. From 1882 to 1886, while yet on the threshold of his profession, he was elected to the lower house of the state legislature, where his pronounced leadership won for him the distinction of speaker during his second term.

Following his legislative service he was called to the position of City Attorney of Lincoln. In 1887 a vacancy occurred on the district bench of the Second Judicial District of our state, then comprising the counties of Lancaster, Otoe and Cass. The district had many able and experienced jurists, but the Governor selected Mr. Field as the most available and promising to fill the vacancy. The appointment was approved by the voters of the district at the ensuing election. His administration of the office met with general approval, both by the bar and the general public, and he was re-elected in 1891 as one of the three judges of the Third Judicial District, then, as now, comprised of Lancaster county alone.

As a judge he was cool, deliberate, conscientious and courageous. He swept aside the element of influence. The merits of the controversy alone appealed to him. Personally he was courteous, unassuming and approachable, but demanded absolute respect for the dignity of the court, and unquestioned obedience to its orders and decrees. From the bench he gave forth decisions, not doubts.

In 1892 he resigned his place on the bench to accept the republican nomination for congress from the First Nebraska District. While he was defeated at the polls by a small majority, the campaign is still remembered as one of the most vigorous and spectacular in the history of the district, if not of the state. After this campaign, and until his death, he devoted his energies to the practice of his profession, and refused to be lured therefrom, though often tempted.

He was a safe and able lawyer, one of the strongest in the state, and a good counselor. He won a large and in-

fluential clientage; participated in much important litigation; was frank and courteous to the court and to his adversaries. He never misled nor deceived; was always cool and under self-control; he was never ruffled except under extreme provocation. He possessed the confidence of the courts and the profession to an unusual degree. He never encouraged litigation, and did not hesitate to refuse a retainer when the merits of the question involved did not appeal to him. He possessed that rugged common sense to which men turn for guidance in the affairs of life, and his advice on legal, educational and legislative questions was, until his death, in great and growing demand. The influence of his life is impressed on much that now is, and will continue as an inspiration in shaping and moulding much that is yet to be.

Be It Therefore Resolved:

1. That the Supreme Court and bar of the State of Nebraska unite in expressing sincere and deep regret for the loss which the state and its people have suffered in the untimely death of Allen Wescott Field. He served them faithfully and well, in private and public station, without fear or reproach. In the two score years of his active life, he did much to preserve the standards of sane, useful conduct and work in the every-day walks of life, as well as in the halls of legislation and in the courts. The influence of his life and the result of his work have contributed largely to promote confidence in, and respect for, the fixed rules of order and stability so essential to the preservation of the fundamental institutions of our country.

2. That in his death the state has lost one of its strongest, most useful and dependable citizens, the bar a highly esteemed and able member, his colleagues one of their most valued and respected fellow citizens.

3. That we request these resolutions be entered upon the records of this court, and the clerk thereof be directed to send a copy of the same to the family of the deceased

as an expression of our unfeigned sympathy for them in the loss they have sustained, and in which we share.

A. C. Ricketts,
E. J. Hainer,
Edward P. Holmes,
A. J. Sawyer,
J. B. Strode,
F. M. Hall,
Edward P. Brown.

BY THE COURT:

The resolutions presented and the remarks so aptly express the sentiments of the court, it is ordered that they be spread upon the records and printed in the reports, as a lasting tribute to his memory.

A. M. Morrissey,
Chief Justice.

During the period covered by these reports, in addition to the cases reported in this volume, there were 34 cases affirmed by the court without opinion, and 24 cases disposed of by the supreme court commission.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1915,

LOUIS FINK, APPELLEE, V. CHARLES M. MURDOCK ET AL., APPELLANTS.

FILED MARCH 13, 1915. No. 17994.

Mortgages: FORECLOSURE: SALE: APPRAISEMENT. Record examined, and its substance set out in the opinion. *Held* free from error.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

E. O. Kretsinger and *Ernest L. Kretsinger,* for appellants.

A. D. McCandless, contra.

FAWCETT, J.

Appeal by defendant from a judgment of district court for Gage county confirming a sale in a suit for the foreclosure of a mortgage.

The errors assigned are: (1), that the judgment was not sustained by sufficient evidence; (2) that the appraisers were not disinterested and impartial appraisers; (3) the published notice of the time and place of sale was not given by publication for 30 days before the time of the sale; (4) the property sold for a sum grossly less than its fair market value, so much so as to make it appear to have been the result of fraud on the part of the appraisers; (5) that the appraisers were not selected by the coroner who made the sale, but by outside parties.

The first and fourth assignments are practically the same and will be considered together. The decree of foreclosure was for $1,052.38. After a nine months' stay taken by defendant had expired the property was appraised at $1,825. At this sale plaintiff bid two-thirds of the appraisement, and the property was declared sold to him. This sale was set aside. A second order of sale was issued and the property appraised by two new appraisers at $2,305. Under this appraisement the property was twice advertised and offered for sale, and not sold for want of bidders. A third order of sale was then issued, and the property appraised by two new appraisers at $1,920. It was twice offered under this appraisal, and not sold for want of bidders. A fourth order of sale was then issued to the coroner, plaintiff having filed objections to the sheriff and his deputy. Under this order the property was appraised by two business men of Wymore, neither of whom had acted under either of the other appraisements, at the sum of $2,000, and the property was sold to plaintiff for $1,337. This sale was the one confirmed by the lower court. It will be seen that the property had been appraised four times, and offered for sale six times. Plaintiff was the only bidder at any of these sales. The amount of the highest appraisement, under which there were no bidders, was $2,305. Defendant filed his own affidavit fixing the value of the property at $5,000, and the affidavit of three freeholders fixing the value at $4,800. This affidavit was sworn to before defendant himself as a notary public, and is not entitled to be considered. Even if the affidavit of the three freeholders could be considered in connection with the affidavit of defendant, it would not justify a reversal of this case on the ground of inadequacy of the valuation fixed by the appraisers. The fact that the property had been offered for sale six different times, under four different appraisals, in none of which the value was fixed above $2,305, and that no person other than plaintiff ever made a bid of any amount, even at such valuations, constitutes a complete refutation of the value of the property as fixed by defendant and his three freehold-

ers. The rule is well settled in this state that, to justify the setting aside of a sale on the ground that the property was appraised too low, the actual value of the property must so greatly exceed the appraised value as of itself to raise a presumption of fraud in the making of the appraisement. We think the facts above outlined clearly indictate that the property was appraised by the appraisers called by the sheriff and coroner under the several orders of sale at substantially its fair value.

The second assignment is without merit. There is no competent evidence in the record to show that the appraisers Huston and Jeffrey were not disinterested and impartial appraisers.

The third assignment is also without merit. The sale was made September 16, 1912. The proof of publication shows that the notice was published in the "Weekly Wymorean" for five consecutive weeks, the first publication being on August 15, 1912. It appears, therefore, that there was a strict compliance with the settled rule in this state, as announced in *Cuyler v. Tate*, 67 Neb. 317: "Notice of a judicial sale published in every issue of a weekly newspaper for thirty days before the day of sale is sufficient."

The fifth assignment is likewise without merit. The only ground which we can discover for the complaint set out under this assignment is that the coroner made inquiries as to who would make suitable appraisers, and in the course of his inquiries talked to Jesse S. Newton and the appraiser Huston. An attempt is made to show that Newton was prejudiced against the defendant, but there is no competent evidence to show that the appraisers Huston and Jeffrey were not reputable business men in the city of Wymore, and disinterested and impartial appraisers. That the appraisal which they actually made was a fair appraisal is fully established by what has already been said.

Finding no error in the record, the judgment is

AFFIRMED.

MORRISSEY, C. J., ROSE, and HAMER, JJ., not sitting.

ETHEL BURGE, APPELLEE, V. C. F. ADAMS COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 17995.

Appeal: REVERSAL. "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin*, 90 Neb. 122.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Morsman, Maxwell & Thompson, for appellant.

Lambert, Shotwell & Shotwell, contra.

FAWCETT, J.

This action was instituted in the district court for Douglas county to recover damages which plaintiff claims to have sustained as the result of fright occasioned by an assault with a revolver. The jury returned a verdict in favor of plaintiff for $1,933, upon which judgment was entered, and defendant appeals.

The record shows that defendant is a corporation engaged in the sale of household goods upon the instalment plan. Plaintiff purchased some quilts on that plan, agreeing to pay 25 cents a week on the purchase price. At the time of the alleged assault she was in arrears for three or four weeks' payments. One Grabill, a collector for defendant, called at her apartments to collect her past-due payments. The house appears to have been a duplex house, plaintiff's mother and sister living on the first floor, and plaintiff, with her husband and family, occupying the second floor. Plaintiff testified that she saw Grabill ascending the stairs, and met him at the top and before he had quite reached the landing. Being told by him the purpose of his call, she told him that she did not have the money that week on account of the recent death and burial

of the baby. Grabill told her that he had to have payments on the things, "and I says, 'You won't.'" This precipitated an altercation between them. Grabill said he must have the payments or the quilts. She replied, "No; you won't take the goods," and started away from him. She says he told her to "halt," and that when she turned around he pulled a revolver, pointed it at her and said "he would fix" her. Grabill denied this, and testified that he did not have a revolver, but that when she had called him the name which, when used between men, usually results in a fight, and her mother and sister appeared at the foot of the stairs, he placed his hand upon his hip pocket as a bluff so as to enable him to make his escape. The above is a very brief statement of what transpired at the time the assault is alleged to have been made, but it is sufficient to show the character and extent of the assault, if one were made. When both sides had rested, defendant requested the court to instruct the jury to return a verdict for defendant, which request was overruled.

Conceding, without deciding, that the evidence was sufficient to take the case to the jury on the question of whether or not an assault had been committed as alleged, we are next confronted with defendant's assignment of error that "the verdict of the jury is so excessive as to clearly show that it was the result of passion and prejudice." The testimony as to the extent of plaintiff's injury was given by herself, her mother and her husband. Plaintiff testified that when Grabill "pulled the gun on her" she thought he was going to kill her and became very nervous; that immediately after he left she went to bed; that after lying down she was jerking, crying and nervous; that she was frightened; that she remained in bed for a week, nervous and weak; that a physician attended her during the week; that after a week she was able to be up for a while; was up and down; that this condition continued for four or five days; that the nervous condition was still with her at the time of the trial; that she had not been well since the assault; that she had not been nervous prior thereto. Her mother testified that after

Grabill left she went up stairs and found plaintiff in bed; that she attended her; that she was "awfully" nervous and was crying; that she quieted her down as much as she could; that she sent for a doctor twice that evening; the first time they were unable to get him, so they made the second call; that she was "awfully bad," and remained in bed for about eight days; "of course, she would sit up, but she could not stay up for quite a while at a time, because she was so nervous;" that she had nervous headaches all the time; that she shook pretty near all the time except when they would be talking to her; that she cried off and on; had spells of crying all the evening, all the rest of the day and all the evening; after she got up from bed she was still nervous; that she called plaintiff's husband about 4 or 5 o'clock that afternoon. The husband testified that he was called home about 5 o'clock; when he got there his wife was lying in the apartment; was nervous and seemed to be in pretty bad shape; was crying and said she came pretty near getting shot; her condition was a nervous breakdown; summoned a physician; she was confined to her bed for over a week; she suffered a nervous breakdown; had headaches; before that her health had been good; "she never was right after that, or hasn't been up to the present time; * * * she was a little better at times, of course, and then, if she would have any excitement or other thing, it would cause her another breakdown; she would have to go back to bed again."

This is all of the testimony offered as to the nature and extent of plaintiff's injuries. It shows that they called a physician, who, plaintiff testified, attended her for a week. This physician was not called as a witness, nor any reason assigned why he was not called. There is no evidence to show that after plaintiff left her bed, about eight days after the alleged assault, she was not able to perform all of her regular duties, or that she suffered in any way except from occasional spells of nervousness. Plaintiff testified that at the time of the trial (December, 1912) she was 20 years of age; that she had three children living; one, a babe born October 26, another three, and the

other six years old; that about ten days before the time of the assault, on February 13 of that same year, they had buried still another child, who at that time was six months old. This testimony shows that when plaintiff gave birth to her first child she was only 14 years of age; that at the time of burying the six months' old child on February 3, 1912, she was pregnant with the babe born October 26. We think it is not surprising that she may have had spells of nervousness during those eight months. The jury returned a verdict in favor of plaintiff for $1,933. This verdict, under the evidence above outlined, is so grossly excessive that we see no escape from appellant's contention that it was not based upon the evidence in the case, but was the result of passion and prejudice. This appears to us to be so clearly a case where passion, prejudice, mistake, or some means not appearing in the record controlled the jury that we cannot permit the verdict to stand. Our conclusion upon this point renders it unnecessary for us to consider any of the other questions presented and argued.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

MARY C. LEGAN, APPELLANT, V. FRANK SMITH, APPELLEE.*

FILED MARCH 13, 1915. No. 18002.

1. **Appearance.** "An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not." *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 273.

2. **Wills: CONSTRUCTION: VESTING OF BEQUEST.** The fifth clause of the will, set out in the opinion, examined, and *held* to have vested in

* Modified. See opinion, p. 682, *post*.

defendant, immediately upon the death of the testatrix, an unconditional title to and interest in the bequest therein expressed, and that the only office of the demand specified in the proviso in such clause would be to prevent a forfeiture of such bequest at the end of one year.

3. **Garnishment: DEMAND.** Where a debtor has funds in the possession or under the control of another under such circumstances that he cannot institute an action therefor without previous demand, such funds, if otherwise liable to be subjected to garnishment, cannot be exempt for want of preliminary action on the part of such debtor. In such case the creditor would have the right to make the demand and reach such fund by garnishment.

4. ———: DISCHARGE OF GARNISHEE: SUFFICIENCY OF EVIDENCE. The evidence examined and partially set out in the opinion, when considered together with the facts and circumstances surrounding the parties, *held* insufficient to sustain the judgment discharging the garnishees.

APPEAL from the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

W. S. Morlan and *Lewis C. Paulson,* for appellant.

Tibbets, Morey, Fuller & Tibbets, contra.

FAWCETT, J.

In 1902 defendant left his home in Kearney county for parts unknown, abandoning his four minor children, who since that time have lived with and been cared for and supported by their grandmother on their mother's side. The petition alleges that when defendant departed he left the children with plaintiff, with the request that she care for and look after them; that she has done as requested, but that defendant has failed and refused to provide any support for the children or to pay her any part of the sum reasonably due plaintiff therefor, which she alleges is the sum of $4,304, for which the petition prays judgment. In April, 1912, Sarah Smith, mother of defendant, departed this life, leaving a last will and testament by which she disposed of all of her property to her three children, consisting of defendant, a sister, Edna B. Milbourn, and a brother, Arthur H. Smith. The will was duly probated in

May, 1912. By the third and fourth clauses in the will Mrs. Smith devised the south half of a quarter section of land in Kearney county to her son Arthur, and the north half thereof to her daughter Edna. The fifth clause is as follows: "I give, devise and bequeath to my son Frank Smith the sum of thirty-five hundred dollars ($3,500) to be paid to him within one year after my death, my said legatees above each to be charged with the one-half thereof and the said share hereby made chargeable to the said respective legatees is hereby made a lien upon the land herein respectively bequeathed to each to wit: $1,750 shall be a lien on the south half and $1,750 on the north half of said quarter section. Provided, however, that if the said Frank Smith shall fail to call for and demand said legacy hereby bequeathed to him within one year after my death then he shall not be entitled to receive the same nor any portion thereof but the same shall be void and of no effect as to him and every person who may claim under him." On July 13, 1912, plaintiff commenced this action to recover the sum due from the defendant, and sought to subject to the payment of her claim, by attachment and garnishment, the money which she claimed was payable to defendant from his brother and sister, under the will, and they were duly summoned as garnishees. From a judgment discharging the garnishees and sustaining an alleged special appearance of defendant and dismissing plaintiff's action, she appeals.

Some time shortly prior to the death of Mrs. Smith, it was learned by the family that Frank was living in the state of Oregon. Service was made on him in that state. He filed the following special appearance: "Comes now the above named defendant and appears specially for the sole and only purpose of objecting to the jurisdiction of the court on the following grounds: (1) The summons was not returned within the time fixed therefor. (2) The affidavit for service by publication is false in the following particular: The legacy to defendant in the will therein mentioned was not unqualified as stated in said affidavit, but was conditioned upon demand therefor by said lega-

tee within one year, which demand has never been made by defendant. (3) The copy of said summons alleged by the return to have been served on defendant was not certified by the deputy who made such return to be a true copy. (4) The garnishees served in said action are not indebted to defendant in any amount whatever, and have no property of defendant in their possession, and defendant has no property or credits within said Kearney county or state of Nebraska, and the allegations of the said affidavit to that effect are false and untrue. (5) The alleged copy of summons, which is hereto attached, contained no description of any property attached or credits garnished. (6) The affidavit for attachment is false and untrue for the same reasons set out in paragraph four hereof. (7) No notice to defendant was ever published and no process was ever served upon defendant, either personally or constructively, notifying him of any attachment or garnishment. (8) That at the time of the attempted service of process upon defendant no property, rights or credits of defendant had been attempted to be taken or seized in said state of Nebraska, and such attempted service of process was therefore void, defendant being at such time a nonresident of Nebraska, and no service of process having been attempted except by the copy of summons hereto attached." The trial court sustained this special appearance and dismissed plaintiff's action. This was clearly erroneous. The attempted special appearance of defendant was a general appearance and gave the court full jurisdiction over his person. *Perrine v. Knights Templar's and Masons' Life Indemnity Co.*, 71 Neb. 267, and, on rehearing, 273.

We infer from the record that Arthur H. Smith and Mrs. Milbourn, who were served as garnishees, filed with the clerk of the district court some sort of an answer, but such answer does not appear in the record. The record simply shows that they appeared and answered questions propounded to them by court and counsel. From their testimony it appears that from the time Frank left home, until shortly before the death of their mother, his where-

abouts were unknown, but that shortly before the death of their mother, as stated, it was learned by the family that he was living in the state of Oregon. When the will was filed for probate Arthur wrote defendant and explained to him the conditions of the will, especially that portion that Frank was interested in, and also sent him a waiver of notice of the probating of the will, which Frank signed and returned to him. Thereupon he and his sister both joined in the waiver, and the same was filed in the probate court, and the will was duly probated. Arthur and Mrs. Milbourn each testified to having received several letters from Frank after the death of their mother, but, when asked if they had the letters, Mrs. Milbourn answered: "No, sir; I didn't make it a point to keep them." Arthur answered that he did not have any of the letters which he had received. When asked what he did with them, he answered: "Burned them up." They each testified that Frank had not made any demand on them for the amount bequeathed him in the will. Mrs. Milbourn answered that she never intended to send Frank any of the money unless he demanded it, and that she never would do so. Arthur was asked: "Q. Will you ever send it to him if he does not? A. I don't think I will; no, sir." The testimony of both shows that there had been some talk with the attorney for the executor about obtaining from Frank a release of the lien upon their land before sending him the money. Arthur testified: "Mr. King suggested it. Q. You got the suggestion from Judge King about getting a release before sending the money to your brother in Oregon? A. We didn't ask Mr. King for the release; Mr. King suggested that we do certain things. Q. Why would he suggest doing certain things? A. I don't know what his reason was; I didn't ask him for the information." Taking the testimony as a whole, we think the court erred in discharging the garnishees. It is too great a tax upon our credulity to ask us to believe that there was not a perfect understanding between Frank and his brother and sister in relation to the money coming to him under his mother's will, or that he would allow a

$3,500 well-secured bequest to go unclaimed. If, by a secret agreement with his brother and sister, he can so manipulate the matter that his mother-in-law may be defrauded of her just compensation for taking care of his children, he evidently is ready to perpetrate that fraud. Why is it that after ten years' absence a correspondence suddenly springs up between these brothers and sister? Why is it that Arthur has "burned up" the letters which he received from Frank, and that Mrs. Milbourn "didn't make it a point to keep them?" How does it happen that the three are all appearing in this action by the same counsel? There is only one reasonable answer—that they are acting in concert to enable Frank to obtain this money in fraud of the right of plaintiff to reasonable compensation for the board, clothes, care and medical attention bestowed upon his children for ten years. Circumstances speak louder than words ofttimes, and the circumstances in this case indicate, we think, that Frank has signified to his brother and sister his intention to call for the money, and that they are so regarding the matter. The district court has misconstrued the proviso in the will. A demand by Frank was not necessary to vest the bequest in him or to fasten a liability upon the garnishees therefor. Frank's interest vested immediately upon the death of his mother. The only office of a demand upon his brother and sister for the payment of the bequest was to prevent a forfeiture of the bequest at the end of one year. Hence, we think it is clear that the proviso is a condition subsequent and should be so treated. Being such at the time this action was commenced and process in garnishment served upon the brother and sister, who by the terms of the will were made liable for the payment of the bequest, the garnishees owed Frank $3,500 absolutely and unconditionally. It is true, he could, *subsequently,* release them from that liability by failing to call for it, but that did not alter the fact that at the time the action was commenced there was an indebtedness coming to him from his brother and sister which could be reached by his creditors by garnishment. This being so, he could not prevent his creditors from obtaining, out of

this fund, payment of money due them, by simply sitting back and failing to make a demand. They would have a right to make the demand for him; and, by instituting the present action, the plaintiff must be held to have made such demand. As stated by counsel for plaintiff, where a debtor has property or funds in the possession or under the control of another, "under such circumstances that he cannot institute an action therefor without previous notice or demand, such property or funds, if otherwise liable to be subjected to garnishment, cannot be exempt for want of such preliminary action on the part of the defendant; for, if so, he might foil the thrust of the creditor by purposely avoiding the giving of the notice or the making of the demand." Such dishonest conduct the courts will not sanction.

The judgment of the district court is reversed, with directions to overrule the special appearance of defendant Frank Smith and permit plaintiff to prove her debt against him, and to require the garnishees to appear and make further answer, and for further proceedings in harmony with this opinion.

REVERSED AND REMANDED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

SAMUEL S. HALSTED, APPELLANT, V. WILLIAM SHACKELTON, APPELLEE.

FILED MARCH 13, 1915. No. 18005.

Trial: DIRECTION OF VERDICT. Where the evidence offered by plaintiff in an action at law is insufficient to sustain the cause of action set out in his petition, it is not error for the court to end the trial by directing a verdict for the defendant.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher, for appellant.

Albert W. Crites, contra.

FAWCETT, J.

Action in the district court for Sheridan county to recover upon an oral contract for the sale of an undivided one-half interest in a twenty-horse power gasoline engine and a number of smaller articles in the way of appliances to be used in connection therewith.

The answer alleged that the property was in fact purchased by the defendant jointly with the plaintiff upon a written order signed by them and sent to the Harvester Company, which was the real seller of the same; that when plaintiff received the engine he delivered it to one Snodgrass, without the knowledge or consent of the defendant; that defendant in joining in the purchase of the engine relied upon warranties made by the plaintiff and printed upon the written order; that the engine did not in any respect comply with the warranties; that plaintiff, after repeated attempts to do so, was unable to put the engine in condition so that it would do the work for which it was sold and in accordance with the warranties under which the sale was made. The reply was a general denial.

Upon the trial to the court and a jury, when plaintiff had completed the giving of his testimony, defendant moved for a directed verdict, on the ground that the testimony of plaintiff shows that the purchase and operation of the engine was a joint transaction between himself and one Snodgrass, amounting to a joint liability and a joint adventure, the accounts whereof had not been determined, and that no action at law could be maintained by plaintiff "at the present time for any recovery on account of the machine in question." Thereupon the court asked counsel for plaintiff if he had any other or different evidence than that already given to establish the case between plaintiff and defendant as alleged in his petition, to which counsel for plaintiff replied: "We have no different evidence. We have some admissions of the defendant, but they would not change the effect of defendant's exhibit A." Thereupon the court sustained the motion and di-

rected a verdict for defendant, upon which judgment was entered. Plaintiff appeals.

The evidence of plaintiff himself shows that the engine was purchased from the Harvester Company on an order signed by himself and Snodgrass, at a time when defendant was not present. Subsequently, and after this order had been sent to the Harvester Company, defendant joined in the order, by signing a copy of the same, prepared by plaintiff. When the engine arrived it was delivered by plaintiff to Snodgrass, and there is no escape from the evidence that thereafter Snodgrass and defendant used and operated it, with its accessories, as a copartnership. The books of plaintiff show that purchases made of gasoline and repairs for the engine were sometimes charged by him to Snodgrass, and sometimes to "Snodgrass and Shackelton." He was asked: "Q. Now, if Mr. Shackelton sent for it (oil), why did you charge it to Snodgrass? A. Because they were considered a firm. Q. Snodgrass wasn't a firm was he? A. He was one of them."

It would serve no good purpose to review in detail the testimony given by plaintiff. Taken as a whole, and in connection with his own books of account, it fails to establish any right of recovery by plaintiff against the defendant individually. The district court did right therefore in directing the verdict.

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

STATE, EX REL. EDWIN DAVIS, APPELLANT, V. THOMAS HOCTOR, MAYOR, ET AL., APPELLEES.

FILED MARCH 13, 1915. No. 18864.

Mandamus: CONTROL OF DISCRETION. While the writ of mandamus may be issued to require an inferior tribunal or board to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control its judicial discretion. Rev. St. 1913, sec. 8271.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Affirmed.*

A. H. Murdock and *C. J. Southard,* for appellant.

Murphy & Winters, contra.

FAWCETT, J.

As stated by relator in his brief, this is an action in mandamus to compel the mayor and city council of the city of South Omaha "to designate a particular kind of material to be used in paving, curbing and guttering a certain street, and award the contract therefor to the lowest bidder." A peremptory writ was denied by the district court for Douglas county, and relator has appealed.

An improvement district for the paving, curbing and guttering of a certain street was created by the city council of the city of South Omaha upon a petition signed by the owners of a majority of the taxable foot frontage, all as required by section 4716, Rev. St. 1913. The regularity of the proceeding establishing the improvement district is not questioned. Thereafter the council advertised for bids for the different kinds of material designated, as required by section 4718. The alternative writ recites that Abel & Roberts filed a bid, accompanied by a certified check, offering to pave the street with Egyptian vitrified brick block, class B; that M. B. Jensen filed a bid, accompanied by a certified check, for curbing and guttering with "Cowboy brand, Kansas cement, Louisville stone, Platte river sand, plan C;" that, within the time specified in section 4719 of the act, relator filed with the city clerk a petition designating Egyptian brick block, class B, as the material to be used in paving the street, and designating Cowboy brand, Kansas cement, etc., as the material to be used in curbing and guttering. There was also filed a bid for paving with "Buffalo brick block, class B, with combined curb and gutter, plan B." The petition designating the material, as originally filed by the relator, contained the names of the owners of a majority of the taxable foot frontage of the district. Before the 20 days for designating material had

expired, Theodore L. Phelps, who had signed the first-named petition for five lots, notified the council that he had elected to withdraw from that petition and desired his name to be counted on the petition for Buffalo brick block, and the father of Charles Ladd Thomas, who had signed the petition for two lots, in the absence of his son from the state, took like action in the name of and for his son. When Charles Ladd Thomas returned home he, on August 3, filed a written ratification of the act of his father as his agent. With these two names withdrawn from the petition which relator had filed, that petition would be insufficient in amount. With them remaining on the petition, it was sufficient. The relator contends that the Phelps name could not be withdrawn, for the reason that his act in making such withdrawal was induced by an agreement on the part of the representative of the Buffalo brick block bidder that, if he would so withdraw his name, the James J. Parks Company, who were the bidders for the Buffalo brick block, would refund and pay to Phelps the sum of eight cents per square yard of the cost of paving, assessed and taxed against the lots owned by Phelps; that such agreement was unlawful and fraudulent, and the attempted withdrawal of Phelps was therefore null and void. The record shows that this offer on the part of the Parks Company was to refund or remit to all of the property owners in the district eight cents per square yard, which would be one-half of the difference between the Parks bid and the bids of Abel & Roberts, and Jensen. Relator further argues that the attempted withdrawal of Charles Ladd Thomas was void, for the reason that his father had no authority to sign his name to such withdrawal, and that his attempted ratification, on August 3, of the act of his father was unavailing, for the reason that the 20 days allowed the lot owners to designate material, had expired on July 27; that the rights of the parties all became fixed on that date and his attempted ratification at a later date would not relate back to and legalize the act of his unauthorized agent on July 27. At

the meeting of the city council on August 10, the mayor and council, on consideration of all of the matters, found that the record owners of a majority of the foot frontage of taxable property in the district "have failed to file a sufficient petition with the city clerk as by law permitted, and hence it becomes the duty of the mayor and council to select and designate from those bids upon the kind and class of paving material to be used upon said street in said district." It thereupon designated "Buffalo brick block, class B, with combined curb and gutter plan B," as the material with which the street should be paved, and awarded the contract therefor to the James J. Parks Company. On the same day, August 10, the relator demanded of the mayor and council that they reconsider and rescind the resolution adopted by them on that date, designating Buffalo brick block, and awarding the contract for the work to the Parks Company, and further demanded that they designate Egyptian brick block as the material to be used for paving, and award the contract therefor to Abel & Roberts, and that they designate the Cowboy brand, Kansas cement, etc., as the material to be used as curbing and guttering, and award the contract therefor to M. B. Jensen. This demand not being complied with, relator, on the next day, commenced this action in mandamus to compel the city council, as recited in the alternative writ, to rescind the resolution, passed by them on August 10, designating Buffalo brick block; rescind their action awarding the contract to the Parks Company; to designate Egyptian brick block as the material for paving, and award the contract therefor to Abel & Roberts; to designate the Coyboy brand, Kansas cement, for curbing and guttering, and award the contract therefor to Jensen; or show cause why the same was not done. On a full hearing the district court held that both of the petitions involved in the controversy were insufficient, and rejected the same; that relator was not entitled to the peremptory writ as prayed, and ordered that the application for the writ be denied and the action dismissed at relator's cost.

We are now asked, in this action, to review the action of the mayor and city council in passing upon the sufficiency of the petitions in controversy. This we must decline to do. The duty of examining the petitions rested upon them, and the determination of their sufficiency was a judicial discretion vested in them. They have already exercised that discretion. They have passed upon the question of the sufficiency of the petitions presented, and held them insufficient, and have awarded the contract for the paving, curbing and guttering to the Parks Company. If their action was wrong, it was an error which relator could have had corrected by the ordinary methods in such cases. That it was wrong is, to say the least, not entirely clear; but, whether so or not, their judgment cannot be reviewed by mandamus. As said in *State v. Nemaha County*, 10 Neb. 32: "But whatever errors may have been committed by the board of commissioners in rejecting the names of signers of said petition (for the calling of a special election for the relocation of the county seat) they cannot be considered in this case. Such alleged errors may be reviewed by a proper proceeding, but cannot be corrected in an application of this kind by mandamus."

This well-settled rule is decisive of this case. The fact that the district court decided the case on the merits, is immaterial, as the result reached—viz., the dismissal of relator's action—properly disposed of the case.

AFFIRMED.

MORRISSEY, C. J., BARNES and LETTON, JJ., not sitting.

JAMES S. REED, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 17993.

1. **Damages: PERSONAL PROPERTY: MEASURE OF DAMAGES: EVIDENCE.** In an action to recover damages to personal property, if there is substantial evidence that the whole damage was caused by the

defendant's negligence, the plaintiff should be allowed to prove the value of the property before and its value after the injury complained of, since this would be the true measure of damage if the jury find that the defendant's negligence caused the entire damage.

2. **Contributory negligence** is an affirmative defense, and cannot be proved unless alleged in the pleadings.

3. **Appeal:** MISCONDUCT OF JURY. When a case has been submitted to the jury for a verdict, it is improper for them to separate without permission of the court, and if some of the jurors leave the officer in whose care the jury has been placed, and go to a saloon and drink liquors, it is misconduct; but if it appears that such jurors were within view of the officer, that they conversed with no one, and did not become intoxicated, and there is nothing to show prejudice to the party complaining by such misconduct, or that the other party was aware thereof, it will not require a reversal of the judgment.

4. **Eminent Domain:** RAILROADS: CONSTRUCTION: DAMAGE TO REALTY. Damages to real estate caused by the proper and necessary construction of a railroad accrue when the road is built; but if the road is improperly and negligently constructed, and property is injured because of such negligence, the action for such damage accrues when the damage occurs.

5. **Damages:** SUFFICIENCY OF EVIDENCE. The evidence is found to support the verdict and judgment.

APPEAL from the district court for Harlan county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Byron Clark, W. S. Morlan, R. L. Keester and *E. E. Whitted,* for appellant.

John Everson and *O. E. Shelburn, contra.*

SEDGWICK, J.

Some of the matters discussed in the briefs in this case were decided in a former action between the same parties. *Reed v. Chicago, B. & Q. R. Co.,* 86 Neb. 54. That action was for damages caused by high water in 1905, and as in this case the damages, it was alleged, resulted from the negligence of the defendant in the construction of its road. The situation of the premises and the location and construction of the road are stated in that opinion and will

therefore not be repeated here. The damage then done by the flood to the railroad grade and culvert were repaired by defendant, and in August, 1911, the plaintiff's crops and personal property were again damaged, and he brought this action in the district court for Harlan county, again alleging the negligent construction of the road as the cause of the injury. There was a verdict and judgment in his favor, and the defendant has appealed.

The first objection is that the court erred in allowing plaintiff, in proving his damages, to give evidence as to the value of his property before and after the injury. It is said that this was not the proper measure of damages, because the property would have been damaged to some extent by the natural action of the flood if no railroad had been there. The plaintiff offered evidence tending to prove that the whole damage was caused by the negligent construction of the road. The proof was sufficient to require that his theory of the case be submitted to the jury, and the evidence objected to was therefore competent. It does not appear that the construction of the road has been substantially changed since the damages occurred which were considered in *Reed v. Chicago, B. & Q. R. Co., supra.* The reasons there stated for supporting a finding that the negligent construction was the cause of the injury need not now be repeated.

When the plaintiff had rested and the defendant was introducing evidence, the plaintiff asked leave to withdraw his rest and introduce in evidence a map which he produced. The defendant objected to this for several reasons: First, because it was not proper rebuttal testimony, and should have been offered, if competent, in chief; second, because it is not sufficiently identified and authenticated, and that no foundation had been laid for its introduction. The court overruled this objection and the map was received in evidence. This map purports upon its face to be published by a disinterested publishing house. It relates to the physical conformation of the territory involved, a matter that could be established readily without question. It does not appear from the record that the de-

fendant was unprepared to meet such testimony, and it seems clear that the court did not err in receiving the evidence.

The defendant contends that the storm was so unusual and the rain fell so excessively that it must be considered as the "act of God," and that the damage would have occurred without regard to the construction or existence of the railroad. But that question was satisfactorily submitted to the jury upon substantially conflicting evidence, and must be considered as determined by their verdict. There was no allegation of contributory negligence in the answer, and the defendant was not at liberty, therefore, to rely upon such defense.

The defendant insists that there was misconduct of the jury which requires a reversal. It appears that there was misconduct both of some members of the jury and the officer who had the jury in charge. After the case had been submitted to the jury for their verdict, the officer in charge, while conducting the jury to their hotel, permitted two of the jurors to go some distance from the care of the officer to a saloon for the purpose of obtaining intoxicating liquors. It appears that they entered a saloon and did obtain and drink the liquors there. The question is whether it sufficiently appears from this record that this misconduct of the officer and jurors was so prejudicial to the cause of the defendant as to require a reversal. It appears that these jurors were not in the saloon but a very few minutes; that they could be seen and were watched by the officer while there; that they had no conversation with any persons; that they did not become intoxicated or under the influence of the liquors which they drank; and that the plaintiff had no knowledge of this misconduct and did not participate in it. We cannot say that the trial court abused its discretion in holding that it did not sufficiently appear that the defendant's cause was prejudiced by this misconduct.

It is contended that the court erred in allowing the plaintiff to testify as to the effects of the flood on his buildings, fences, lands, and improvements. Of course, dam-

ages to the land itself caused by the necessary and proper construction of the railroad would accrue when the road was built, and not from time to time as those damages might appear; but if the road is improperly and negligently constructed, and property is injured because of such negligence, the action for such damage accrues when the damage occurs. Moreover, it seems that this evidence, if incompetent, was not prejudicial to the defendant. The jury were required to find the damages to personal property and the damages to the land and dwelling house separately. They did so in their verdict, and found that there was no damage by this flood to the land and dwelling house, and that the damage to the personal property was $1,000, and assessed the plaintiff's recovery in that sum accordingly. The recovery was limited to damages caused by the improper and negligent construction of the road.

It is not contended that there was error in the instruction of the court. The evidence supporting the issues so presented is not so deficient as to require a reversal.

The judgment of the district court is therefore

AFFIRMED.

MORRISSEY, C. J., not sitting.

SEDGWICK, J.

There is another question presented in this case which the writer of the opinion thinks ought to be discussed and determined. In its discussion I speak for myself alone, and not for the court.

The plaintiff contends in the brief that the question of the competency of the map above referred to as evidence is not properly presented, because he says no objection was made to its reception and no exception was taken to the ruling of the court. If this contention of plaintiff was sustained, it would not be necessary to determine the competency of this evidence, since the error, if any, in receiving it would have been waived by failure to make objection. Naturally, we would first determine whether the question of its competency was presented before passing upon that question. It was therefore a question essential to the de-

termination of the case and was fully presented in the briefs. I do not think we ought to evade this matter now. We ought to determine whether the objection of defendant to the reception of this evidence was sufficient to raise and have determined the question of its competency. This is the more important, it seems to me, because the records that come before us show that there is a general misapprehension among the members of the bar, and perhaps also among the trial courts, as to the construction that this court has put upon the statute. We must not allow useless technicalities to prevent justice, nor even to occupy the time of the courts to the exclusion of matters of importance. The record in this case shows the following: "Plaintiff asks leave to withdraw rest and introduce exhibit (the map) on examination in chief. Defendant objects to the plaintiff withdrawing his rest for the purpose of introducing his exhibit 1 at this time, as incompetent, irrelevant, immaterial and no foundation laid. Objection overruled. Defendant excepts. Plaintiff's exhibit 1 was thereupon offered in evidence." If the evidence was incompetent, the court would not, of course, allow the rest to be withdrawn for the purpose of putting the exhibit in evidence. The court, therefore, passed upon the competency of the evidence over the objection of defendant, and the evidence was admitted. To again make the same objection, and then enter a formal exception to the ruling of the court, would not make it any clearer that the defendant objected to this evidence as incompetent and the court admitted it notwithstanding the defendant's objections.

The plaintiff cites *Moore v. Jacobs*, 64 Neb. 72, in which the correct rule is stated as follows: "The objections argued in the brief * * * were in nowise presented to the trial court, and therefore we cannot consider them on this appeal." The rule that objections will not be considered here, unless they are presented to the trial court, necessarily follows from the universally applied rule that this court will not consider and determine questions that were not before the trial court and by it tried and determined. The ruling, if rightly understood and applied, is

necessary to the proper administration of justice, and cannot be abandoned without impairing the efficiency of the trial courts, to the great injury of litigants. No established form of words is indispensable in presenting to the trial court those questions which may materially affect the rights of the parties in the trial of the case. If it appears from the record that the trial court did in fact, against the wish of the party injured, allow incompetent evidence, the verdict so obtained would not be allowed to stand, unless it also appears upon the record that the party complaining was not materially injured thereby. If one party to the litigation offers incompetent evidence, and the other party by silence and failure to object does not in any way acquaint the court with the fact that he considers it objectionable and desires it excluded—that is, if objection is in nowise presented in the trial court—he will not be allowed afterwards to assert that he has been prejudiced by such testimony. Under such circumstances the court is justified in presuming that both parties desire to have the evidence in the record. The necessity of taking exception and of entering objections upon the record arises entirely from this rule of law, and when it plainly appears from the record that the court has intentionally ruled upon the question, knowing that the party injured is contending that the ruling is erroneous and prejudicial, the failure to formally note the word "exception" upon the record would be immaterial. It appears from this record that the court was aware that the defendant objected to this evidence as incompetent, and that the evidence was allowed over the objection of the defendant.

The case of *Dunbier v. Day*, 12 Neb. 596, decided more than 30 years ago, is perhaps the leading case on this subject. In the opinion the court say: "As to the witness Inglehart, no exception appears to have been taken to the overruling of the objection to the admission of this testimony." This was an unfortunate expression. It implies that there is a difference between an objection and an exception, and that when an objection is made upon sufficient ground, and the same is overruled, there must also

be an exception. The statute says: "An 'exception' is an objection taken to a decision of the court upon a matter of law." Rev. St. 1913, sec. 7876. "No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible." Section 7878. An exception is an objection and the objection to the ruling of the court is the exception that the statute requires. Judge Lake shows in the opinion that he realized this, for he says: "For aught that appears in the bill of exceptions, counsel was entirely content with the ruling against him." This statement is the key to the situation. The object of the exception or objection, by whatever name it may be called, is to show to the court that the litigant believes that a certain proposed procedure would be prejudicial to his rights; that it would be unlawful, and the reason for supposing it to be unlawful and that he protests against it. If the record shows this, and that the court nevertheless determines the matter against the party so objecting, the court on review should consider whether such ruling was erroneous and prejudicial. Of course, counsel should not leave his position in doubt. It should appear without equivocation whether counsel objected to the ruling at the time or acquiesced therein.

The next case is *Pettit v. Black,* 13 Neb. 142. The rule is stated in the syllabus: "Unless exceptions have been taken in the trial court to the admission or refusal to admit testimony, no error can be predicated thereon." And in the opinion Judge Maxwell said: "We find no exceptions taken on behalf of Mrs. Pettit to any of the evidence introduced"—which shows that he was referring to the exception defined in the statute, which is an objection. If a party allows evidence to be given without challenge, he cannot afterwards complain. This was the condition that Judge Maxwell was speaking of.

In *Wheeler v. Van Sickle,* 37 Neb. 651, objection was made to the admission of a writing on the ground that no foundation had been laid. After the objection was made, "counsel * * * interrogated the witness at some

length," with the view to laying a sufficient foundation. Then the writing was again offered. Of course, if the objecting party did not concede that his objection had been obviated by this additional evidence, he would have so informed the court by renewing his objection. There are many other decisions in which the question is mentioned, but these are perhaps sufficient to illustrate my meaning. I think that the following should have been included in the syllabus of the opinion:

When objections argued in the brief have been "in nowise presented to the trial court," they cannot be considered in this court. But no established form of words is indispensable in presenting to the trial court those questions which may materially affect the rights of the parties in the trial of the case. If it appears from the whole record that the trial court did in fact, against the wish of the party injured, allow incompetent evidence, the verdict so obtained would not be allowed to stand, unless it also appears upon the whole record that the party complaining was not materially injured thereby.

When it plainly appears from the record that the court has intentionally ruled upon the question, knowing that the party injured is contending that the ruling is erroneous and prejudicial, the failure to formally note the word "exception" or "objection" upon the record would be immaterial.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT, V. BRIDGES, HOYE & COMPANY, APPELLEE; LION BONDING & SURETY COMPANY, APPELLANT.*

FILED MARCH 13, 1915. No. 18890.

1. **Appeal: CASE STATED.** These cases are presented in a "case stated" under rule 14 (94 Neb. XIII), and were, at the request of the parties, advanced for hearing as that rule provides. This practice facilitates the work of the court, and saves time and expense for litigants

*Modified so as to allow attorney's fees. See opinion, p. ——, *post.*

2. **Insurance**: ACTION: COSTS: ATTORNEY'S FEES. Chapter 234, Laws 1913, providing for attorney's fees in actions of this kind, has no application to contracts entered into before that act took effect.

3. **Schools and School Districts**: BUILDING CONTRACT: BOND: LIABILITY OF SURETY. Chapter 28, Laws 1889, secured payment of mechanics' and laborers' wages "for labor that shall be performed in the erecting, furnishing or repairing of the building, or in performing the contract," with the public authorities. It must be construed to protect a subcontractor and laborers employed by him, as did the general mechanic's lien law then in force. The surety on the contractor's bond was liable for all labor necessarily employed in performing the contract. *Des Moines Bridge & Iron Works v. Marxen & Rokahr*, 87 Neb. 684, followed. *Fidelity & Deposit Co. v. Parkinson*, 68 Neb. 319, distinguished.

4. ———: ———: ———: ———: MATERIALMEN. The act of 1913 (Laws 1913, ch. 170) for the first time extended like security to materialmen. The contracts in these cases were entered into before that act took effect, and as to materials furnished the bond must be considered a common-law contract.

5. ———: ———: ———: ———. The undertaking in the bond to guarantee "all liability of the first party for all bills for work, labor and materials to be incurred in connection with the contract herein referred to," and that he "shall promptly pay all bills for work, labor and materials performed or furnished in and about said work," must be construed to include all labor and materials involved in the work specified in the contract; that is, that enter into the structure or are consumed in and about the work, but not for tools and appliances which are the property of the contractors and may be used from time to time in other works and upon other contracts, and which are not consumed in the work or which do not go as a part of the building or improvement and necessarily enter therein. The use of an engine for hoisting materials, the repairs on such engine, and oil and fuel used in operating the same are not guaranteed by the surety. Lumber for concrete forms, if consumed in constructing the building, and a small proportion of sacks, of little comparative value, in which the cement for such concrete was sold, without proof that it was practicable, and contemplated by the parties, that all sacks would be returned to the materialman, are allowed to be recovered for in these cases.

APPEAL from the district court for Dodge county: GEORGE H. THOMAS, JUDGE. *Affirmed on condition.*

Courtright, Sidner & Lee, for plaintiffs.

Sullivan & Rait and *George B. Thummel, contra.*

SEDGWICK, J.

The attorneys for the parties in this case have made good use of rule 14 (94 Neb. XIII) of this court. By so doing they have saved themselves and the court much labor and their clients much expense. It appears that there were pending in the district court for Dodge county four several cases, all involving the same legal questions. These questions were determined by the district court in each of the four cases, and thereupon the counsel representing the respective parties entered into a stipulation under rule 14, which provides for a case stated. The case stated begins with these words: "In the District and Supreme Courts of the state of Nebraska. First Case: Nye-Schneider-Fowler Co., plaintiff, Appellant and Appellee, v. Bridges, Hoye & Co., Defendant and Appellee; Lion Bonding & Surety Co., Defendant, Appellant and Appellee." Then follows the title of each of the other three cases, and the statement proceeds as follows: "Stipulation for Consolidation, Joint Appeal and 'Case Stated' under Supreme Court Rule No. 14. Come now the parties to the four actions above mentioned, and both plaintiffs and the surety company, defendant, intending to appeal to the supreme court, do hereby stipulate as follows: 1. The first and second cases were commenced in the district court for Dodge county, and the third and fourth cases were commenced in a justice court, and by agreement stipulated to said district court for trial. Issues were properly joined in all four of said cases so as to properly present for adjudication the matters now in dispute and to be determined by the supreme court, and said matters were adjudicated by the district court. 2. This stipulation contains a fair abstract or statement of the essential questions, of the pleadings, findings and rulings of the court, exceptions, and of the facts in all of said four cases; and this stipulation when signed and approved by the trial judge and filed with the clerk of the district court and then certified to the supreme court, together with a transcript of the final judg-

ments in said actions, shall constitute a complete 'case stated' under rule fourteen of the supreme court. Said four actions shall be docketed and determined as one case in the supreme court." Then follows so much of the pleadings and agreed facts in the case as are necessary for presentation of the questions of law relied on by the respective parties, and an agreed statement of the law questions involved and controverted. In each case there is also a transcript of the record containing the final judgment.

It appears from the case stated that a school district of Dodge county entered into a contract for the erection of a high school building in Fremont. The contractor agreed "to furnish the work and material and to clear and level the grounds." The contractor entered into a bond with the Lion Bonding & Surety Company as surety, in which the contractor and the bonding company are "held and firmly bound unto the school district of Fremont, in the county of Dodge, in the state of Nebraska, second party, for all liability of the first party for all bills for work, labor and materials to be incurred in connection with the contract." The suits were prosecuted upon the bond. The plaintiffs asked that attorney's fees be taxed in their favor, which the court refused. The defendants contend that the court allowed items of recovery which are not properly allowed in such actions. These are the two questions presented.

1. Should the court have taxed the attorney's fees as costs in the case? Section 1, ch. 234, Laws 1913, provides for such fees. It appears to be conceded that the bond upon which these actions are brought is, as between the school district and the contractor, within the terms of this statute. The bonding company contends that this statute has no application to bonds entered into before the statute took effect, and in this we think that the bonding company is correct. The statute of 1873 provided for the allowance and recovery of attorney's fees in certain actions. This statute was repealed in 1879. In *White v. Rourke*, 11 Neb. 519, it was held that "the repeal did not affect contracts entered into prior to" the repeal, and in *Bond v.*

Dolby, 17 Neb. 491, it was held that an attorney's fee was properly allowed upon the foreclosure of a mortgage which provided for such attorney's fee and was executed before the repealing act of 1879 took effect. The act of 1913 is quite analogous to the act of 1873, and by those decisions the allowance of attorney's fees under the statute depends upon the existence of the statute at the time of entering into the contract. It seems clear that the legislature by the act of 1913 did not intend to impair the obligations of existing contracts.

2. It appears from the case stated that the decree of the court included various items of credit for lumber and material, some of which the defendant contends were improperly allowed. The nature of these items, so far as is necessary to an understanding of the controversy, will be stated in connection with the discussion thereof. In *Fidelity & Deposit Co. v. Parkinson*, 68 Neb. 319, the petition of the plaintiff alleged that he furnished to the defendant, "for the construction of said building, material and labor to the amount and value of $921.78," and alleged that there was a balance due the plaintiff "for the work and labor so furnished." The judgment of the court was for $127.70 "for material and labor furnished by the plaintiff." The statute, as it existed then, did not include materialmen, and because the judgment was for both material and labor, instead of being for labor exclusively, it was reversed. The reversal is expressly put upon that ground. In the syllabus, however, it is said: "It is doubtful if the subcontractor who furnishes work and material in the construction of such building is within the terms of the statute." And in the opinion, after quoting from New York cases, it is said: "These cases, with which we are inclined to agree, seem to imply that a statute like the one under consideration is intended for the protection of the laborer who does the manual labor on the building, and not for the contractor who furnishes both labor and material in the construction of the work embraced within the contract." But it is expressly said that the court does not pass upon that question, both because it was not argued

on the submission of the case, and because the case "will have to be reversed for the reason that the judgment was given for labor and material, while the suit was brought for labor alone." The doubt in the opinion as to whether a contractor who furnishes labor in the construction of the work is entitled to a lien is derived from the opinion of the court of appeals of New York in *McCluskey v. Cromwell,* 11 N. Y. 593; but upon examination of that case it will be found that it does not justify such doubt. In that case the contract of sureties, which follows substantially the language of their statute, guaranteed that the contractor "shall and do well and truly pay or cause to be paid in full the wages stipulated and agreed to be paid to each and every laborer employed by him or his agent or agents, in the construction of the work." The court held that the subcontractor and the laborers employed by the subcontractor were not employed by the contractor himself, and therefore were not within the terms of the contract and the bond. This proposition is reasoned extensively by the court, and in conclusion the court said: "The courts can neither usurp the functions of the legislature, by doing or assuming as done what they may think should have been done in the way of legislation, or take the place of contracting parties, and vary the terms of their agreements to meet any supposed equities."

The statute in force when the contracts in the cases at bar were made was enacted in 1889. Laws 1889, ch. 28. The act is entitled "An act to secure the payment of mechanics' and laborers' wages on all public buildings where the provisions of the general mechanics' lien laws do not apply." It requires the public officers to take from the contractor a bond "conditioned for the payment of all laborers and mechanics for labor that shall be performed in the erecting, furnishing or repairing of the building, *or in performing the contract.*" When this statute was enacted the general mechanics' lien law provided: "Any person or subcontractor who shall perform any labor for or furnish any material or machinery or fixtures for any of the purposes mentioned in the first section of this act, to the

contractor or any subcontractor, who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement, * * * and, if the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such labor or material, machinery and fixtures." Comp. St. 1881, ch. 54, sec. 2. This statute gave the subcontractor and the laborers employed by him a lien for the material furnished and labor performed, and it seems clear that the statute now under consideration intended to furnish laborers with equivalent security for labor performed on public buildings where no lien was allowed. It expressly guaranteed compensation for labor "performed in the erecting, furnishing or repairing the building, or in performing the contract." To give the proper force and effect to the words "or in performing the contract," they must be construed to include all labor required to perform the contract with the proper authorities.

In *Des Moines Bridge & Iron Works v. Marxen & Rokahr*, 87 Neb. 684, it is held that, when the contractor has "agreed to furnish the material, machinery, appliances and labor necessary for the construction of, and construct, equip and fully build, a courthouse," and the bond of the surety is conditioned "that if the said Marxen & Rokahr shall well and truly keep and perform all the conditions of this contract on their part to be kept and performed, and shall indemnify and make payment and save the said Seward county harmless as therein stipulated, then this obligation shall be of no effect," the bond is a common-law contract, and the surety assumes "an obligation to pay the subcontractors and materialmen, as well as the laborers and mechanics engaged in constructing the courthouse referred to." That case recognizes a conflict in the authorities, citing some of them, and bases the conclusion upon our own decisions, some of which are also cited with approval, and others distinguished.

The act of 1913 (Laws 1913, ch. 170; Rev. St. 1913, sec. 3840) for the first time extended like security to material-

men. We conclude, then, that in these actions the surety company was by virtue of the statute liable for all labor necessarily employed in performing the contract entered into with the public authorities. These contracts were entered into before the act of 1913 took effect, and, as to the material furnished, the bond is exclusively a common-law contract, and is to be construed as such, The condition in this bond is that the company is bound "for all liability of the first party for all bills for work, labor and materials to be incurred in connection with the contract herein referred to." The liability of the surety is also stated in this contract in the following words: "Shall promptly pay all bills for work, labor and materials performed or furnished in and about said work." This contract covers labor performed, and, as we have said, is not regarded as in conflict with the statutes.

Plaintiff's counsel insists that the words "in connection with the contract" must be construed to protect "all parties becoming creditors of the contractor." Of course, he means creditors "in connection with the contract," but he does not state any plain rule by which it can be determined with certainty what creditors must be considered as having become such in connection with the contract with the school district. The necessity of such a plain distinction is obvious. If the contractor whose business was to take such contracts from time to time should, while engaged in this particular work, purchase wagons with which to deliver his materials, with the expectation of using them similarly in other work for years afterwards, the bill for such wagons might in some sense, perhaps, be said to be in connection with this contract, but surely not within the contemplation of the parties. What, then, might be reasonably contemplated by the parties from a fair construction of the language used? The surety guarantees that the contractor will pay for all work and labor performed and for all material furnished "in and about said work." This is the last expression of that matter in the contract, and it is agreed that if this is complied with the bond shall be void. The "work" is the construction of the building

and removal of the debris. The labor and materials involved in that "work" were evidently what was contemplated by the parties to the contract. If the contractor bought his materials in Chicago and paid the freight charges thereon to Fremont, the cost to him of the materials at Fremont would include the freight charges, and likewise, if he paid drayage to the building site, the cost of the materials that went into the building would include drayage also. Labor and materials that enter into the structure or are consumed in or about the work may be recovered for in such action, but not "for tools and appliances which are the property of the contractors and may be used from time to time in other works and upon other contracts, and which are not consumed in the work or which do not go as a part of the building or improvement and necessarily enter therein." *Ninneman v. City of Lewiston*, 23 Idaho, 169. Such tools and appliances would, of course, include machinery and rope used for hoisting, and, as the use of such tools and machinery cannot be recovered for, neither can repairs or oil or fuel used in operating such machinery. Lumber for concrete forms, if consumed in constructing the building, would constitute material used.

In these cases such lumber to the value of $6,874.65 was used and consumed, except the comparatively insignificant amount of $70. The court allowed for the full value of the lumber so used which had not been paid for, making no reduction for the $70 which was realized by the contractor and was not consumed in the work. This item was so small in comparison with the whole amount of lumber furnished that it may be said that the lumber furnished was practically consumed in the work. And, for the same reason, the court was right in not deducting 10 cents for each cement sack. The case stated shows that cement was furnished in sacks, and that by agreement the contractor was to be allowed 10 cents for each sack returned. There were 279 sacks not returned. There is no presumption that it is practicable to return all the sacks in which the cement is furnished, and, as this mate-

rial could not be furnished without the sacks, they are practically a part of the material furnished and consumed in the work.

The judgment in the case of the Nye-Schneider-Fowler Company included an item of $44.05 for coal used in running the hoisting engine. This was erroneous, and that judgment will be reversed, unless the plaintiff files in this court a remittitur in that amount within 30 days. If such remittitur is filed, the judgment will be affirmed. A similar item of $12.70 was allowed in the judgment of Hotchkiss et al., and the same order will be entered. In the judgment of Thomas & Courtright Hardware Company was improperly included $26.36 and $17.55 for articles used by the contractor, but which were not consumed and did not enter into the structure. The same order, therefore, will be entered as to those items. The judgment of Orvis Clark was wholly for drayage properly included. That judgment is therefore affirmed, with costs. In the other three cases, the costs in this court will be taxed to the party incurring the same.

JUDGMENT ACCORDINGLY.

LETTON, FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. ANTON PINKOS ET AL., APPELLANTS, V. ROBERT H. RICE, APPELLEE.

FILED MARCH 13, 1915. No. 18903.

1. **Mandamus: OFFICERS: PERFORMANCE OF DUTIES.** The discretion of a public officer cannot be controlled by mandamus, but when a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus.

2. **Appeal: SUPERSEDEAS: CONDITIONS: FORECLOSURE.** Upon decree of strict foreclosure of a contract of sale of real estate, the supersedeas bond upon appeal to this court should contain the condition that the defendant will pay the reasonable value of the use of the premises pending the appeal if the decree is finally affirmed.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Affirmed.*

B. F. Good, E. D. Kilbourn and *A. M. Bunting,* for appellants.

Ralph M. Kryger, Lyle E. Jackson and *O. A. Williams, contra.*

SEDGWICK, J.

Harry Thissen obtained a judgment in the district court for Antelope county against these plaintiffs, Anton Pinkos et al., foreclosing a contract of sale of real estate. The decree of strict foreclosure found the amount due Mr. Thissen and directed its payment on or before a day fixed in the decree, with interest, and continued: "If said payment is made as above provided, said plaintiff to convey to defendants the above described premises, by a good and sufficient deed." But, if payment was not made as directed, then the defendants "shall be forever barred and foreclosed of all interest, either vested or contingent, and all equity of redemption, in said premises, and final writ of ouster to issue and plaintiff be put in possession of said premises." The defendants applied to the court for a supersedeas and to fix the amount of the bond. The court allowed the supersedeas and directed that the bond be "conditioned that defendants will prosecute appeal without unreasonable delay; will not, during pendency of appeal, commit, or suffer to be committed, on said premises, waste of any character whatsoever; that defendants will pay all costs, and also pay to plaintiff the reasonable value of the use and occupation of said premises from December 1, 1914, until delivery of possession of said premises to plaintiff, if this decree be affirmed." The defendants in that case tendered to the clerk of the court a bond for his approval, and the clerk refused to approve the same because it did not contain the condition to "pay to plaintiff the reasonable value of the use and occupation of said premises," as directed by the court. The defendants in that case then brought this action in mandamus against

the clerk to require him to approve the bond. The district court found in favor of the defendant and dismissed the proceedings, and the plaintiffs herein have appealed.

1. The first contention is that mandamus is not the proper remedy. It is, of course, well settled that mandamus cannot be used to control the discretion of a public officer. The plaintiffs however, insist that the statute fixes the bond, and that the order of the court requiring this additional condition was without jurisdiction and of no effect, so that the clerk had no discretion in the matter. Under such circumstances mandamus would be the proper remedy.

2. The principal question in this case is as to whether the court had jurisdiction to direct that the bond contain this condition, to pay the reasonable value for the use and occupation of the premises while the case was pending if the decree of foreclosure was affirmed. The statute formerly provided for a supersedeas in such case without this condition, but chapter 126, Laws 1903, amended this statute in this regard, and provided that, when the decree "directs the sale or delivery of possession of real estate, * * * and if the appeal be from an order of confirmation of sale the bond shall be further conditioned, if the appellant will pay to the purchaser the value of the use and occupation of the property from the date of the undertaking until the delivery of the possession if the order appealed from be affirmed." The decree of strict foreclosure is equivalent to the confirmation of sale in an ordinary foreclosure and comes within the meaning of this section. The court, therefore, did right in requiring this condition in the bond, and the clerk was not required to approve the bond without that condition. See *Escritt v. Michaelson*, 73 Neb. 634, and on rehearing, 640, where a somewhat similar question is considered.

The judgment of the district court is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JOSEPH MATICKA, APPELLEE, V. EDWARD E. JENSEN, APPELLANT.

FILED MARCH 13, 1915. No. 17859.

Highways: ESTABLISHMENT BY USER. Where, after an attempt has been made to lay out a public road across open prairie land, which, through failure to comply with statutory requirements, fails to legally establish such road, the public enters upon and uses the same as a public road, and the owner of the land traversed thereby fences his land on each side of the road along the entire line thereof, cultivating the land on one side, and using that on the other side as a pasture, and these conditions continue to exist for ten years or more, the irregularity in the original proceeding will be *held* cured, and such land thereby becomes and will remain a public road until vacated or abandoned, as provided by law.

APPEAL from the district court for Howard county: JAMES N. PAUL, JUDGE. *Affirmed.*

W. H. Thompson, for appellant.

T. T. Bell, contra.

HAMER, J.

The plaintiff is the road overseer. He brought an action in Howard county, seeking to enjoin the defendant from fencing in and plowing up an alleged highway. The cause was tried before the Honorable James N. Paul, one of the judges of the district court. The defendant had filed a motion to dissolve the injunction granted at the commencement of the case. The case came on for trial on the petition and answer in the main case. There was an effort to punish the defendant for contempt. The court reserved his decision on the order to show cause why the defendant should not be attached for contempt until a full hearing should be had. The trial was on May 10, 1912. The journal entry of the trial recites: "The court, after hearing the evidence and argument of counsel, and after consideration, and being fully advised in the premises, finds on the issues joined that a county road exists on and across the

northeast quarter of section twenty-nine (29) township sixteen (16) north of range ten (10) west, of the sixth P. M., in Howard county, Nebraska, near the northeast corner thereof, cutting off about twelve acres in said corner; that said road was established in the year 1883, and the same has been in continuous use by the public generally from said date up to November, 1911; that said road has been unlawfully closed and fenced by the defendant, Edward E. Jensen, and said fences are now across, upon and obstructing public travel along and on said road. On the main cause in this case, it is considered and adjudged by the court that a mandatory injunction issue commanding Edward E. Jensen, defendant herein, to remove any and all obstructions of whatever nature or kind, either in, on, over, or across said road, and that he open said road 66 feet wide over and across said land, and that he do so within five days after notice of this injunction and order; and the said defendant is enjoined from (in) any manner obstructing said road or interfering with public travel on, along and over said road henceforth." There was a further finding that the defendant was not guilty of contempt in disobeying the temporary injunction. From the order made the defendant appeals.

On May 17, 1912, a further order was made: "That the defendant, Edward E. Jensen, take down and remove all fences and other obstructions in, on, over and across the public highway running across the northeast quarter of section 29, in township 16, range 10, in Howard county, Nebraska, near the northeast corner of said quarter section, and he, the said Edward E. Jensen, is further enjoined from erecting, placing upon or causing to be erected or placed upon, or in, by himself, his agents, attorneys or employees, any fence or obstruction in, over or upon said highway, and from digging, plowing or in any manner damaging said highway, and from in any manner interfering with public travel on and along said highway; and the said Edward E. Jensen is further ordered to remove all such obstructions and keep said highway clear there-

from for a width of 66 feet at all points across the said northeast corner of said quarter section."

The evidence shows that in 1883 a petition was filed by 13 resident taxpayers in the vicinity of the road in question, asking for the laying out of the road. The evidence does not show that any of the statutory requirements for the laying out of public roads was subsequently complied with. The only other evidence of any action that was taken is an entry in the commissioners' record as follows: "On motion, the road petition, filed by Michael Chmielecki et al. was granted as prayed for." After these informal proceedings were had the public continued to travel across defendant's land by substantially the same route as theretofore; the only variation being a slight change of a few rods at one end of the road caused by the construction of a fence. This change was made about 21 years prior to the time of the trial of this suit. Therefore the public gradually used the road in question as a public road, and the owner of the land traversed thereby fenced his land on each side of the road along the entire line thereof, cultivating the land to crop on one side, and using the land on the other side as a pasture. These conditions continued to exist for at least 15 or 20 years prior to the time defendant attempted to close the road.

The defendant relies upon two defenses: (1) That no road was ever legally laid out across his land, which is true. (2) That he closed the road by permission of the county commissioners under an agreement made with them that if he would grade the road on the section line around the northeast corner of his land, so as to connect the section line road at the point where the road in controversy left the east line of his land with the section line road where the road in question connected therewith on the north line of his section, and put a culvert over a draw which would have to be crossed by the grade mentioned, all at his own expense, except as to the material for the culvert, which the commissioners agreed to furnish, they would waive and relinquish the right to use the road in controversy; that he performed the work as agreed, at an

expense of about $300, and gave a roadway around the northeast corner of his land for the purpose of connecting up with the section line roads; that when the work was completed the commissioners examined it and found it to be in accordance with the agreement, approved it, and then told him that he could close up the road in question; that the traveling public knew he was doing this work at the time it was being done and the purpose for which he was doing it, and that the plaintiff, as road overseer, and the public are now estopped to his closing the road. This contention, of course, must fail. The irregularity in the proceedings for laying out the road, in 1883, was cured by the subsequent use of the public for more than ten years, the right to which use was recognized and acquiesced in by the owner of the land in the construction of the fences along both sides of the road as above shown, and in permitting the use of the road by the public without objection for so long a period of time. The road having been thus established, it will remain a public road until vacated or abandoned, as provided by law. The judgment of the district court was right, and it is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

EDITH B. COPELAND, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 17929.

1. **Appeal**: FINDINGS: EVIDENCE. On a controverted question of fact, the finding of the jury will not be disturbed if there is evidence tending to support it, unless it is clearly wrong.

2. **Carriers**: INJURY TO PASSENGER: NEGLIGENCE: PRESUMPTION. When it appears in an action against a common carrier for personal injury caused by the negligence of the carrier that some defect in the appliances of the carrier, or some act of its employees in the conduct of its business, contributed to the accident which caused

the injury complained of, a presumption of negligence on the part of the carrier arises, and, unless there is evidence against the presumption, it will be sufficient to establish the allegation of negligence of the carrier.

3. **Trial:** INSTRUCTIONS. The defendant is not entitled to an instruction that the jury should not be governed by sympathy for the plaintiff, nothing having transpired to indicate that the jurors were unmindful of their sworn duty.

4. ———: ———: DISCRETION. The giving of such an instruction is within the discretion of the trial court.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

John L. Webster, W. J. Connell and *William Ross King*, for appellant.

Wymer Dressler, contra.

HAMER, J.

This action was brought by the plaintiff in the district court for Douglas county, Nebraska, to recover damages for personal injuries alleged to have been sustained while the plaintiff was a passenger on a street car in Omaha on the 11th day of November, 1907. The plaintiff claims that the injury was sustained because of the careless and sudden starting of the car while the plaintiff was alighting therefrom. The basis of the plaintiff's claim is negligence upon the part of the street car company. The case was tried before Judge Sutton and a jury. There was a verdict for the plaintiff, assessing her damages at $2,000, and on this verdict a judgment was rendered, from which an appeal is taken to this court.

The plaintiff, Edith B. Copeland, claims to have been injured while alighting from one of the cars of the defendant company. She claims that she sustained a fracture of the coccyx by reason of the sudden starting of the car while she was in the act of alighting at Fourteenth and Douglas streets, Omaha. She claims to have boarded the car at Seventeenth and Nicholas streets. She was on her way to the Burlington headquarters. It was necessary for

her to alight from a car south-bound on Fourteenth street at Dodge street, and to transfer to a car going east on Dodge street, known as the "Dodge" car. Mrs. Copeland claims that the car known as the "South Omaha" car, from which she was in the habit of transferring at Fourteenth and Dodge streets to the Dodge street car, stopped on this particular morning at the southwest corner of the intersection. She says that she generally left her home on the 7:30 A. M. car, which takes about 10 to 15 minutes to get to Fourteenth and Dodge streets, and that it would not have been more than 8 minutes at the most either way from 7:45 A. M. when she alighted that morning from the South Omaha car at Fourteenth and Dodge streets. She further claims that she got to work that morning by 8 o'clock at the auditor's office in the Burlington headquarters at the corner of Tenth and Farnam streets. She testified that there were several persons, men and women, who alighted from the car at the time she got off, and that she was the last person to get off; that as she was in the act of getting off the conductor rang the bell and caused the car to start forward. She claims that she was stepping from the lower step at the rear of the car to the street; that she released her hand just as the car started; and that the sudden movement of the car caused her to fall and to strike the end of her spine upon the edge of the car steps. In her testimony she claims that the conductor paid no attention to her, except to laugh at her, and that he went on without stopping his car. She appears to have been unable to get the number of the car. She could not remember whether either of the four conductors brought before her at the trial was the conductor who had charge of the car. A gentleman passenger came to her assistance, but she did not know this gentleman, and has not since seen him. She testified that she arose to her feet and proceeded to the southeast corner of the intersection, where she boarded an east-bound car, and thereafter alighted at Tenth and Farnam streets, from which she proceeded directly to the auditor's office in the Burlington headquarters building. She worked as usual that day.

She sat at her desk, and at night took a car and transferred at Fourteenth and Dodge streets. Plaintiff testified that prior to her injury she was not nervous; that she did not suffer from pains in her back; that she did not have headaches; that she did not have any shooting pains up and down her spinal column; that she had no ailments of the back and spine. She testified that after she received the injury she suffered in that way; that she often had headaches; that she had shooting pains up and down her spine all the time; that she could not sit comfortably, except on one side, and that if she attempted to sit straight she could not get up; that her hips were affected by the changes of the weather, and that she had pains in her hips whenever the weather changed; that she had soreness along her spine; that she had pain all the time; that the pain crept up the spine from the place of injury. She seems to have been unable to sleep well at night, and her husband would massage the muscles with alcohol; that he did this for the purpose of relieving the pain; that she had not been free from pain since she received the injury up to the day she testified. She is shown to have one child.

Dr. Alonzo E. Mack, her physician, testified that he had been practicing medicine in Omaha for 16 years; that he had known the plaintiff for 20 years; that when he first became acquainted with her she was 7 or 8 years old; that he had been her physician 16 years; that he was acquainted with her general physical condition prior to November 11, 1907, and that her condition was good before that time. He then testified that in the latter part of December, 1907, she came to his office and complained of a pain in her back and referred to the lower part of the spine; that he examined her back and lower part of her spine, and found a fracture of the coccyx. He then describes the coccyx as composed usually of four small bones, called vertebrae, set at the end of the spine; that the usual length is from three to four inches; that these small vertebrae may be three, or, four or five, but four is the usual number. He then further describes the coccyx as being slightly curved with the point forward; that in the case of the plaintiff

it was pointing directly forward, and that it was fractured at the middle joint, and therefore, that there were two vertebrae dislocated or broken off. He then testified that the coccyx serves as an attachment for muscles and is a protection to the nerves; that there are important nerves in the vicinity; that these nerves come to a sort of a center at the coccyx, and that a fracture of the bones causes pain; that, if the support for the muscles which control the bowels should be broken, every movement of the bowels would cause pain to the patient; that the natural and necessary result of a fracture of the coccyx would be pain more or less constant and continuous; that it would be a constant irritant, and that its effect would become best marked as time went on; that unless one should be informed by some competent person he might not know that the coccyx bone was fractured, and might not at once rush to a physician. He testified that he had observed Mrs. Copeland's physical condition from time to time since 1907, and that she was nervous; that she was more nervous at the time of the trial than she was a year prior to that time; that she was growing more and more nervous; that her fractured coccyx bone remains the same, and that the ultimate result must be "a physical and nervous breakdown." "Q. What do you say as to whether Mrs. Copeland's present condition—that is, her fractured coccyx bone—is a temporary or permanent injury? A. Permanent." On cross-examination he testified that the plaintiff was married; that she had the care of a little child at night and also in the day time, and that this, with her present condition, would be one of the natural contributing causes to her nervousness; that nervousness and nervous collapse are so frequent that a large number of specialists have for years engaged in the special practice in Omaha; that besides these specialists every reputable physician and surgeon has cases of this kind; that the witness himself had quite a number of these cases at the time he testified. The witness could not tell how long the injury had occurred to the plaintiff before she came to his office. He did not seem to think that it would be difficult to treat the

plaintiff for the injury, and that treatment could be an efficient remedy. "Q. Would you say that her condition, as induced by the fractured coccyx, is at this time aggravated, or not? A. Yes, sir." He further testified that after a number of years the patient would have decreased vitality and loss of resistance, and that there was an element of greater danger now than at the time the injury was received. The husband of the plaintiff testified that many times he massaged Mrs. Copeland with alcohol.

It is the contention of the defendant that the injury claimed by the plaintiff never occurred. It is also claimed that the court erred in excluding the rule or custom of defendant's employees in reporting accidents. We are unable to see that there was any prejudice to the defendant in this ruling. The particular conductor in charge of the car would not know whether the plaintiff was injured, unless she complained then and there of the injury. Merely slipping and falling in the snow would not of itself be a serious matter in the mind of the conductor, unless attended with apparent serious consequences. That the conductor made no report was probably due to the fact that he did not consider the plaintiff was injured. In any event the ruling of the court was not a bar to any fact sought to be proved by the defendant.

It is claimed that the court erred in refusing to give instruction No. 4, requested by the defendant, cautioning the jury against being influenced by sympathy for the plaintiff. It is claimed that there was no instruction of this character in the court's charge, and therefore that the failure of the court to give an instruction upon this point was prejudicial. We think this matter was one of discretion. It does not follow that the jury were about to be improperly influenced because of the testimony of the plaintiff and of witnesses whose testimony tended to corroborate her. "The trial judge 'is in a position to observe and know whether the situation is such as to render such cautionary instruction necessary to a due administration of justice, and if, in his opinion, they are not, his refusal to give them cannot ordinarily be assigned for error.'" Blashfield, In-

structions to Juries, sec. 344. See, also, *Birmingham Fire Ins. Co. v. Pulver,* 126 Ill. 329; *Central Branch Union P. R. Co. v. Andrews,* 41 Kan. 370. The parties are certainly not entitled to a cautionary instruction of this character, in the absence of special circumstances connected with the trial which would make such instruction essential to a fair trial. The defendant is not entitled to an instruction that the jury must be guided solely by the evidence, and should not be governed by sympathy for the plaintiff, nothing having transpired to indicate that the jurors were unmindful of their sworn duty. *Johnson v. St. Louis & S. R. Co.,* 173 Mo. 307. We are unable to see anything in the case of a pitiful character or which would be calculated to excite unusual sympathy in the jury. There was, so far as we are able to see, no abuse of discretion on the part of the trial court because he failed to give such an instruction, or the instruction requested.

The next point urged by the appellant is that the court did not give sufficient prominence to the contention of the defendant that the plaintiff's story was false, and that no such accident had ever occurred. We are unable to see any error upon the part of the trial court because of anything shown in this contention. When the plaintiff has shown that she was a passenger on the defendant's street car, and that she was injured by the sudden starting of the car while in the act of alighting therefrom, such a situation would seem to raise the presumption that the defendant was negligent. In *Lincoln Traction Co. v. Shepherd,* 74 Neb. 374, it is said in the body of the opinion: "When a passenger is injured through some defect in the appliances of the carrier, or some act that is done by its employees in the conduct of the business, a presumption of negligence on the part of the carrier arises, and this presumption is sufficient, in the absence of any other evidence upon the subject, to supply the proof demanded of the plaintiff upon that point and establishes *prima facie* the negligence of the carrier."

The serious contention of the defendant would seem to be that the accident never happened. The plaintiff has

testified that it did happen. That matter has been submitted to the jury. They have found against the contention of the defendant. Apparently the defendant had a fair trial. We are unable to see any good reason for disturbing the verdict. The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

LOGAN VALLEY BANK, APPELLEE, V. MARTIN CHRISTENSEN ET AL., APPELLANTS.

FILED MARCH 13, 1915. No. 17978.

1. **Parol Evidence: DEEDS: CONSIDERATION.** The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration.
2. **Appeal in Equity: TRIAL DE NOVO.** Upon appeal to this court, an equity cause is tried *de novo*, without reference to the decision in the district court; but, when the trial court has evidently relied upon the testimony of a witness examined before him orally, this court will regard that fact in weighing the testimony of such witness.
3. **Contracts: CONSIDERATION: SUFFICIENCY OF EVIDENCE.** The evidence indicated in the opinion is found sufficient to support the findings and decree of the trial court.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Baldrige, Keller & Keller, for appellants.

C. E. Abbott, contra.

HAMER, J.

Martin Christensen, appellee, carried on a general merchandise business at Uehling, in Dodge county, Nebraska, prior to September 5, 1911. About that time he had difficulty in realizing money out of his assets. Freeman P.

Kirkendall & Company of Omaha were his principal creditors. Christensen's stock and fixtures invoiced between $8,000 and $9,000, and he had accounts and bills receivable amounting to about $1,800. He also had his store building and lot in Uehling (lot 15, in block 9). He also had a dwelling-house and two lots, being lots 6 and 7, in block 18, Uehling, and worth about $1,700. This dwelling-house and the lots on which the same was situate constituted his homestead. Christensen borrowed sums of money from the plaintiff, the Logan Valley Bank, and paid the same to merchandise creditors. He owed the bank $2,000. Christensen's total indebtedness was about $10,000, of which the sum of $8,000 was due to his commercial creditors. The sum of $2,000 due to the Logan Valley Bank was secured by a real estate mortgage on the homestead and store building. Christensen met the appellant Kirkendall in Omaha and talked over the facts with him. On September 5 they together agreed orally that Kirkendall would take over Christensen's business, his stock, fixtures, bills, and accounts receivable, and also his business real estate. Kirkendall was to discharge Christensen's wholesale obligations. A bill of sale of Christensen's personal property to Kirkendall as trustee was drawn up that day and signed, witnessed and acknowledged in Douglas county. A mercantile adjuster named Pearson went up to Uehling to invoice the stock. The stock was invoiced and the bills and accounts receivable were examined. A deed was executed by Christensen and his wife to Freeman P. Kirkendall as grantee. Kirkendall took over the stock, the fixtures, the bills, and accounts receivable, and the business real estate. In the bill of sale the consideration named is "one dollar and other valuable consideration." The only instruments executed seem to have been the bill of sale and the deed. There was no written agreement nor any written evidence of what constituted the "other valuable consideration."

The bank commenced foreclosure proceedings on its mortgage. Mr. Christensen and wife and Mr. Kirkendall were made parties defendant. Mr. Christensen answered

and alleged that, in consideration of the transfer of the property to Kirkendall, Mr. Kirkendall agreed to pay the bank's mortgage of $2,000. This Mr. Kirkendall denied. The court found the issues in favor of Mr. and Mrs. Christensen. The decree in the foreclosure suit, after finding the amount due upon the bank's mortgage, provided: "It is further considered, ordered, and decreed that lot 15, in block 9, of the village of Uehling, Nebraska, aforesaid, be first sold by said sheriff, and that if the same be sufficient to pay the amount aforesaid, with interest and costs, that lots 6 and 7, in block 18, aforesaid, be not sold; and that if the money arising from the sale of lot 15, block 9, aforesaid, shall be insufficient to pay the amount due to the plaintiff, with interest and costs, that lots 6 and 7, block 18, aforesaid, be sold, that upon the confirmation of such sale the defendant Martin Christensen will be entitled to apply to the court for an order and judgment that the defendant Freeman P. Kirkendall shall pay to the said defendant Martin Christensen the amount of such deficiency so satisfied out of lots 6 and 7, in block 18, the homestead of the said Martin Christensen and Magrehte Christensen, together with interest thereon from date of such report."

It appears to have been stipulated at the commencement of the trial that Kirkendall agreed to pay the mercantile creditors. Whether he also agreed to pay the secured claims to the bank was by stipulation left open for proof. At the trial Mr. Kirkendall did not appear and did not testify. Christensen testified that he voluntarily went down to Omaha; that Kirkendall, after hearing a full statement of the facts, agreed to pay all of Christensen's indebtedness; that he agreed to turn over to Kirkendall all of his property; that he explained to Kirkendall how much he owed the bank and how much he owed the building and loan association on the store building. He said that he had a slip of everything, and that everything was laid before the creditors; that Kirkendall agreed to pay everything. Christensen ran the store three months for Kirkendall for $50 a month. He testified that he was

to get all his debts paid; that Kirkendall was to pay the indebtedness to the Logan Valley Bank.

Christensen is positive in his evidence that Kirkendall said he would settle with all the creditors; that he also said that he would pay the $2,000 mortgage. He also testified that Kirkendall and himself made out the "whole thing," meaning the arrangement; that the $2,000 debt owing to the bank had not all been incurred at one time; that he got the money from the bank, and that he paid it to the parties from whom he got the stock of merchandise; that this whole $2,000 was "merchandise debt;" that Kirkendall sent Pearson up to Uehling to take over the property and get the deed.

Pearson testified that the agreement was made between Christensen and Kirkendall before he (Pearson) went up to Uehling, and that he closed up the deal between them when he went up there. Pearson said that he had been given instructions by Kirkendall as to what the agreement was: "Q. You were to go up there and take it over? A. Yes, sir. * * * Q. And you had instructions from Mr. Kirkendall, at the time you went up there, that in taking it over to take an invoice? A. To take an invoice; yes, sir. Q. And report that invoice to him? You stated that your business at that time was that of mercantile adjustments. You mean by that, do you, that you go out for wholesale houses and take over stocks for creditors; that's your business? A. Yes, sir. Q. And then, in line with that, you exercise extreme care to get all that is coming to the creditors? A. I try to."

Christensen told Pearson at Uehling, when Pearson came up, that the agreement with Kirkendall was that Kirkendall was to pay the mortgage. When Pearson prepared the deed, Christensen wanted it fixed so that Kirkendall would be required to pay the mortgage. Christensen testified: "Q. And did you have some difficulty with him (Pearson) as to how the deed was to be drawn? A. Yes, sir; I had a conversation about it, I asked him—I had seen one subject to a mortgage for so much, and I thought that that would be sufficient—and I asked Mr. Pearson if

that was sufficient, that they would sure pay the $2,000; and he said, 'yes.' "

On the other side, it is contended in the briefs of appellants that "it is inconceivable that Mr. Kirkendall would agree to pay all of Christensen's debts, regardless of what they might have been, having only Christensen's word that they amounted to $8,473. Yet Christensen said that the deal was made between himself and Mr. Kirkendall, and claims that Mr. Kirkendall then agreed to pay all his debts."

It is also said in the brief of appellants: "It is inconceivable that Mr. Kirkendall—who is not in the real estate business—would agree to pay a $2,000 mortgage on property that was not worth to exceed $2,000, and that Christensen did not claim was worth more than $2,000, and that, too, without ever having seen the property or learned anything of its value, except from the mere statement of Christensen. Yet Christensen says: 'Q. Mr. Christensen, when was it that you had this conversation with Mr. Kirkendall, in which he said that he would take care of the $2,000 mortgage? Was that the first time you were in Omaha? A. First time I was there; yes, sir.' "

On the trial of the case it was admitted, through Mr. Kirkendall's counsel, that he did what counsel argued was incredible. It was stipulated in open court on the commencement of the trial: "That on September 5, 1911, Kirkendall received said property in full satisfaction of all indebtedness of said Martin Christensen to the creditors scheduled and receipted in exhibit A in defendant Kirkendall's cross-petition filed in this action, and that said Kirkendall agreed that he would discharge all of said indebtedness against Martin Christensen to said creditors as recited, and stated in exhibit A attached to said Kirkendall's cross-petition filed herein." It was also stipulated: "This stipulation is without prejudice to the right or rights of said Martin Christensen and Magrehte Christensen, the defendants, to prove by the evidence that said Kirkendall agreed, as part of the consideration for said deed and bill of sale and transfer so made to him, that he

would pay to said bank said mortgage debt and interest, and discharge the indebtedness of said Martin Christensen and Magrehte Christensen to said bank." Kirkendall appears to have admitted that his obligation was to pay the other creditors. By this admission the stipulation narrowed down to whether he also agreed to pay the bank. The thing, therefore, which appellants argued to be unreasonable was the very thing which they stipulated. It might be said that Kirkendall needed the store building to do business in. It was also possible that he might have a surplus after paying the bank. While it was not especially important to Christensen that his wholesale merchandise bills should be paid in full, except perhaps his desire to be fair and to have his liabilities cleaned up, yet it was important to him that the mortgage which covered his homestead should be paid. This mortgage on the homestead was incurred in business. Because of that fact it was proper to consider that it should be satisfied if the parties so agreed.

The following question and answer relate to the conversation which Pearson had with Christensen up at Uehling: "Q. What, if anything, was said about the indebtedness to the Logan Valley Bank, the corporation plaintiff in this action (referring to his conversation with Mr. Kirkendall in regard to this transaction)? A. That was stated in the mortgage, that it was subject to $2,000, when the property was turned over to him."

At the time Kirkendall bargained for and took a deed to the store building and lot, it may have been worth enough to pay the mortgage to the bank. The apparent object of Kirkendall is claimed by the appellee to be to use it in connection with handling the stock and for what profit there might be in buying and selling it. Pearson seems to have estimated the excess over the amount required to pay the mortgage to amount to $200 or $300. Of course, the principal concern of Mr. and Mrs. Christensen was to have the mortgage debt paid when it fell due and to protect the homestead.

Counsel for Kirkendall make an argument that, because the bank did not hear any conversation between Christensen and Pearson about the mortgage, and because Pearson says that Christensen did not have a conversation with him about Kirkendall paying the mortgage, therefore the probabilities were that there was no such conversation. Kuhlman testified that he did not hear the conversation between Christensen and Pearson, or pay any attention to it. Both Christensen and Pearson testified that there was a long conversation between them about the mortgage and the wording of the deed, both in the store building and also in the bank. Pearson testified directly: "There was at that time quite a conversation in reference to this mortgage." While Pearson disagrees with Christensen as to just what the conversation was, he fully admits the conversation. He also testified that part of the conversation was in the store and part of it was in the bank. Pearson testified: "Q. As you originally drew the deed you left out that clause subject to the mortgage; you put that in after you and he had the conversation? A. There were two deeds drawn, the one of them was worded that they did not like it, the wording in reference to this mortgage. The fact that I had placed in the deed where the mortgage notation was, it was a blanket mortgage, and I described two properties, while it was covering this one property, and then the banker and Mr. Christensen advised that we make the notation subject to the mortgage of $2,000, not designating the other property in the deed." It will be seen that the Christensens did everything that they could to have their agreement with Kirkendall carried out and the home property protected. The putting in of the wording "subject to the mortgage" was not by the advice of Mr. Kuhlman or Mr. Christensen. Pearson put it in himself. The facts and circumstances show that there was an agreement that Kirkendall should pay the mortgage. Pearson drew the deed and handled the wording of it. He said "subject to the mortgage" was enough, and that they were going to pay the mortgage out of the stock. Christensen testified: "I asked him if that was

sufficient to put in, *'subject to the mortgage for $2,000?'* Q. You asked him what? A. I asked him if that would cover it, and he said it would, that that was understood that it was to come out of the stock that he was to pay the bank with. Q. What did he say about paying the bank? A. He said they would pay the bank. Q. You asked him whether the recital in the deed or papers was sufficient to show that they would be compelled to pay that money to the bank? A. Yes, sir. Q. And he said that it was? A. Yes, sir. Q. Who said that? A. Mr. Pearson."

Pearson seems to be mistaken about some of the details of the transaction. He testified to drawing the bill of sale in Uehling after the taking of the invoice. It appears to have been drawn in Omaha and to have been acknowledged there.

The case of *Lexington Bank v. Salling*, 66 Neb. 180, lays down the rule: "The conveyance of land subject to an outstanding incumbrance imposes upon the purchaser no personal obligation to pay such incumbrance." That is undoubtedly true, but the case does not seem to be in point. The question was not in that case whether the consideration could be shown by parol testimony. *Mowry v. Mowry*, 137 Mich. 277; *Herrin v. Abbe*, 55 Fla. 769, 18 L. R. A. n. s. 907; *Magill Lumber Co. v. Lane-White Lumber Co.*, 90 Ark. 426; *Langan v. Iverson*, 78 Minn. 299; *Wiltrout v. Showers*, 82 Neb. 777; 17 Cyc. 653.

"The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration." *Goodman v. Smith*, 94 Neb. 227.

The reason for the rule last above stated is that a change in or contradiction of the express consideration does not in any manner affect the covenants of the grantor or grantee, and neither enlarges nor limits the grant. The real question to be determined is: "What was the actual consideration?" In the instant case there is no written evidence of what the consideration for the deed actually was. It must be proved by parol, or not at all. The language of the deed in reference to the consideration is "and other

valuable consideration." This necessitates oral evidence of what the consideration actually was.

There can be no marshaling of assets as against a homestead. *Mitchelson v. Smith,* 28 Neb. 583; *Cooper Wagon & Buggy Co. v. Irvin,* 83 Neb. 832.

We do not think that the appellants should be permitted to take the homestead of the Christensens away from them. This case was tried before the judge of the district court, Conrad Hollenbeck, who heard the evidence himself without referring the case to a referee. He saw the witnesses and heard them testify. He believed the evidence of Christensen, and we cannot say under the circumstances that he was wrong in so doing.

The judgment of the district court is sustained by the evidence, and it appears to be right, and it is

AFFIRMED.

MORRISSEY, C. J., BARNES and LETTON, JJ., not sitting.

WALTER W. WESTROPE, APPELLANT, V. W. F. ANDERSON ET AL., APPELLEES.

FILED MARCH 13, 1915. No. 17986.

1. **Pleading**: AMENDMENT. Amendments of pleading should be allowed whenever such amendments appear to be "in furtherance of justice." When such amendments make a continuance necessary, or otherwise increase the costs, such terms should be imposed as are just under the circumstances.
2. **Evidence** is examined, and considered sufficient to support the judgment, and no error is found in admitting or rejecting evidence.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Affirmed.*

M. H. Leamy, for appellant.

Fred H. Free and *K. W. McDonald, contra.*

HAMER, J.

This is an appeal from the district court for Pierce county. The case was heard before Judge Welch and a

jury. The jury returned a verdict for the defendants, and the plaintiff has appealed.

The action was upon a promissory note given as the purchase price for land. The defense was fraud in the sale of the land, and failure of consideration. The plaintiff denied those allegations, and alleged that he was an innocent purchaser of the note for full value, before due, in the regular course of business.

The plaintiff in the brief has discussed quite at large the sufficiency of the evidence as to the fraud and failure of consideration. He has quoted largely from the evidence upon that point. We cannot undertake to analyze the evidence within reasonable limits in this opinion. It is substantially conflicting, and the finding of the jury is not so clearly wrong as to require a reversal for that reason. The plaintiff has not complied with rule 12 which requires: "Each proposition must be numbered and separately stated, concisely and without argument or elaboration, and authorities relied upon as supporting them must be cited with each proposition, respectively."

In the course of his argument upon the sufficiency of evidence, it is suggested that the court ought not to have allowed so many amendments to the pleading. The rule of the statute in regard to amendment of pleadings is very liberal, and provides that the court may, "in furtherance of justice, and on such terms as may be proper, amend any pleading." Code, sec. 144. When such amendments make a continuance necessary, or otherwise increase the costs, it is very important that amendments should be allowed upon just terms, and usually, when such amendments are allowed, the only question of difficulty is as to the terms that should be required.

In the same manner plaintiff suggests that the court erred in admitting testimony, but we have not observed any such error in that regard as to require a reversal.

The judgment of the district court is therefore

AFFIRMED.

MORRISSEY, C. J., LETTON and FAWCETT, JJ., not sitting.

STATE, EX REL. PETER ELSASSER, APPELLANT, V. HENRY S. MCDONALD, APPELLEE.

FILED MARCH 13, 1915. No. 18703.

County Commissioners: TERM OF OFFICE. Chapter 46, Laws 1905, is not invalid. Under it and subsequent acts of the legislature, the term of county commissioners of Douglas county is four years.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

John J. Sullivan and *B. S. Baker,* for appellant.

Stout, Rose & Wells, contra.

HAMER, J.

This is in the nature of *quo warranto* proceedings brought to obtain possession of the office of county commissioner of Douglas county. A demurrer to the information was sustained. The ruling on this demurrer is the only question presented by the record. The information alleged in substance, the organization of Douglas county; that it was without township organization; that it had a population of 125,000; that at a general election in November, 1909, John A. Scott was elected county commissioner for district No. 1, in said county, for a period of four years ending January 8, 1914; also the death of said John A. Scott in 1910, after having qualified and entered upon the discharge of the duties of the office; the election of the relator at the November, 1910, election to fill the unexpired portion of said Scott's term; that the relator duly qualified and entered upon the discharge of his duties as commissioner; that "at the general election in 1912, the defendant, claiming that the term of office of the county commissioner of said county is three years, and not four, became a candidate for county commissioner of said district No. 1, and having received the highest number of votes cast at said election, received a document purporting to be

a certificate of election. He thereupon filed the oath and bond required in cases where there is a lawful election, and on the 14th day of January, 1913, intruded himself into the office of county commissioner for district No. 1, of said county, and, with the aid and assistance of the other county commissioners of said county, did on the 15th day of January, 1913, unlawfully and forcibly exclude the relator from his said office, and still continues to so exclude him therefrom;" and that the only ground or reason upon which defendant became a candidate or assumed to qualify for said office is that the term of said office is three years, and not four years.

The question presented by the record is: Is the term of county commissioner in Douglas county three or four years? If for three years, the judgment is right. If for four years, the judgment is wrong. The question presented requires the construction of statutes which were construed by us in the case of *Best v. Moorhead*, 96 Neb. 602. It was there decided that chapter 46, Laws 1905, fixes the term of county commissioners of counties having a population of not less than 125,000 to be four years, and that commissioners elected under and pursuant to that act, as amended, hold their office for four years and until their successors are elected and qualified. The holding of this court in the case just cited is conclusive in the case now before us. In the opinion cited it is said: "We therefore conclude that chapter 46, Laws 1905, is not wholly invalid. It and subsequent acts of the legislature fix the term of county commissioners of Douglas county at four years, and plaintiffs were elected under and pursuant thereto. It follows that the plaintiffs' terms of office are four years and will not expire until January, 1916."

The judgment of the district court is

REVERSED.

MORRISSEY, C. J., LETTON and ROSE, JJ., not sitting.

ANNA SCHMIDT, APPELLEE, V. WILLIAMSBURGH CITY FIRE INSURANCE COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 18783.

1. **Insurance: FIRE POLICY: VACANCY CLAUSE: BREACH.** After a partial loss under a fire policy which renders the building untenantable, the insured is not guilty of a breach of the vacancy clause of the contract where he permits the property to remain unoccupied with the knowledge of the insurer.
2. ———: ———: **CONSTRUCTION.** It is not within the contemplation of the parties that an insured building shall be occupied by a tenant or otherwise when, as a result of its partial destruction by fire, it becomes unfit for occupancy.
3. ———: ———: **AMOUNT RECOVERABLE.** Where insured property is totally destroyed as the result of three fires, the measure of recovery for the final loss is the amount written in the contract, where the insured has complied in good faith with the terms of the policy.
4. ———: ———: **NOTICE: SUFFICIENCY OF EVIDENCE.** The evidence examined and *held* to sustain the verdict of the jury.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Affirmed.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

A. S. Ritchie and *Charles L. Fritscher, contra.*

HAMER, J.

This case comes from Douglas county on a second appeal. The former opinion is reported in 95 Neb. 43.

Anna Schmidt owned a building in South Omaha, which was occupied as a rooming house by colored people. It was insured in the defendant company "to an amount not exceeding eight hundred and no-hundredths dollars." Attached to the insurance policy is a clause which says: "Loss or damage, if any, under this policy, shall be payable to Lion Bond & Surety Company, as mortgagee (or trustee), as interest may appear, and this insurance, as

to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same, "provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof, otherwise this policy shall be null and void."

The policy contains a proviso that, if the building insured shall become vacant or unoccupied and shall so remain for ten days, then the entire policy shall be void. The provision reads: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, * * * or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." The policy also provides that no person shall be deemed the agent of the company in any matter relating to the insurance, unless duly authorized in writing. About March 20, 1910, there was a fire in the insured building which burned a hole around the roof. The tenant moved out. There was a second fire on March 30, 1910, and a third fire April 17, 1910. This last fire seems to have completely destroyed the building, except slight remains of the foundation. The building was vacant and unoccupied from March 20, the time of the first fire, until the last fire, April 17, 1910.

It is claimed that N. P. Dodge & Company preceded Gallagher & Nelson in charge of the insured property.

Gallagher & Nelson were the agents of Anna Schmidt, and had charge of the rental of her houses at the time the building was destroyed.

W. G. Dickey testified that he was associated with N. P. Dodge & Company on the 20th day of March, 1910; that their place of business was the Withnell Block in room 206; that he knew the firm of Gallagher & Nelson, who were in business in the Brandeis Building; that he knew Miss Nelson; that at that time he received word from Miss Nelson in reference to a fire in certain property in South Omaha; that he knew Mrs. Anna Schmidt; that he had been in charge of her property; that he got acquainted with her by being in charge of her property; that Gallagher & Nelson succeeded him in charge of her property; that on the 20th day of March, 1910, Miss Nelson called him up by telephone and told him of the fire which occurred in this property in South Omaha; that it had sustained a loss by fire; that Miss Nelson referred to Mrs. Schmidt's property, and that the witness knew what property it was; that it was the property which N. P. Dodge & Company had had charge of previous to this time; that Miss Nelson had said to the witness that the property had sustained a small loss. She "didn't think it would be very much, and if we would agree to it they would go on and have it repaired."

Dickey testified that he called up Mr. Gibson and told him that Miss Nelson had reported a fire loss on this certain property—Mrs. Schmidt's property; that as he wrote the business, and it was "brokered" through his office, "we wanted him to look after it;" that Gibson said he would look after the matter; that the talk with Gibson was quite soon after he first learned about the fire. The witness testified: "I always look after these things quite promptly, you know."

Miss Nelson testified that Gallagher & Nelson had charge of the business of renting houses for Anna Schmidt; that the property was a two-story rooming house; that she was a member of the firm of Gallagher & Nelson; that the firm had charge of Mrs. Anna Schmidt's business; that she per-

sonally knew the house that was burned; that it was on lot 2, in block 75, South Omaha; that it was a two-story frame building; that about the 20th of March, 1910, it was occupied by a man by the name of Palm; that a fire occurred there, and that she saw the premises shortly after the fire; that it might have been a week afterwards; that "there was a large hole burned in the roof of the building," that it was around the chimney; that on the 21st of March she told Mr. Dickey about it; that she told Mr. Dickey "it was a small loss, a small fire on Mrs. Schmidt's property."

A. N. Gallagher testified that he knew of the fire which occurred on the premises March 20; that he saw the premises on Monday morning, the day after the fire; that there was quite a large hole burned through the roof; that the mortar was all out of the flue, and that mortar and water had dropped down from the top floor, and that the fire had communicated to the top floor, and there was dirt and rubbish around in there; that the premises were then occupied by William Palm; that the premises after this fire of March 20 were not tenantable; that the water from the fire department had dripped down through the ceiling and down the stairway, and that the bedding and beds were all wet, and the plastering, and that the firemen going up there and the people going in had tramped all over the stairs, and plastering and pieces of board and things were all up and down the stairs and floor and very dirty; that the motar was absolutely all out of the flue; that the flue had to be repaired before the house could be used again; that the hole in the roof was seven or eight feet square, and that it was burned up along the flue; that the hole was large enough to admit the rain, if there was any rain, and that anybody occupying the premises would be sure to get wet with that hole in the roof; that Mr. Palm's stove was all covered with water and mortar; that part of it remained and part of it was removed.

Mr. Gallagher testified that Palm had removed all of his effects from the building before the fire of April 17 occurred, or nearly so; that he removed his furniture on the

17th of April; that on the 21st of March it had been snowing; that there was snow on the roof when the witness went down in the morning; that the premises could not be used by a tenant without making a fire; that the night before the last fire, being on the 16th of April, the premises had been repaired; that the repairs were finished. Gallagher talked with Wilken, who said he was an adjuster for the Williamsburgh City Fire Insurance Company, and that he wanted to make an adjustment of the loss of Anna Schmidt; that he had viewed the property and had made a tender of $150—not a tender, but an offer, of $150; that Gallagher told him the offer of $150 was not acceptable; that nothing less than the full amount of the fire would be considered; that Wilken waited around, and the witness told him that it was no use "taking up his time or mine; that if he did not care to meet us on that basis we might as well close it; he picked up his grip and left the office." It was Gallagher who testified that there was nothing left of the house after the third fire, except some bricks in the foundation, worth about $25.

A contractor and builder named Farrell testified that he saw the building about a week or ten days after April 17, 1910; that at that time the woodwork was practically all destroyed, and the foundation was the principal thing remaining; that there was a part of the south side standing, but that it was badly charred, and that the woodwork was worth nothing except for kindling wood.

The chief of the fire department testified that there were people living in the house at the time of the first fire, but that it was vacant on March 30, and also on April 17; that the cause of the first fire was sparks from the chimney; this first fire was telephoned at 10:25 A. M., and the second fire was reported at 5:52 P. M. on March 30; that the fire of April 17 was reported at 1:45 A. M.; that the record of the fire on March 20 showed that there were three companies present and the fire lasted 30 minutes; that the record of the third fire showed that the building was a vacant house.

Arthur All testified that he was a fireman; that he was present at the first fire; that at that time the house was occupied, but that it was vacant at the second and third fires. On March 30 he noticed a mattress, and he believed that was the cause of the fire; that there might have been two mattresses.

O'Laughlin testified that he attended all three of the fires; that the house was occupied on March 20 by colored people; that there was nobody living there on March 30; that he saw one mattress in the basement, and that there was a fire there; that on April 17 there was nothing in the building that he could see, and that no one was living there, and there was no furniture and no sign of occupancy.

Mr. Gibson testified for the defendant, that his office issued the insurance policy sued on; that notice of the fire of April 17 was given to him in a letter from Gallagher & Nelson; that it is the only notice he ever got; that it makes no mention of any other fires than that of April 17; that he was authorized to solicit insurance and to issue policies and to represent the company in matters affecting the execution and delivery of insurance contracts, although he was not authorized to represent the company with regard to the adjustment of losses.

It seems to have been admitted that after the fire of April 17, 1910, the policy had a year and a month, or thereabouts, to run, and that the unearned premium would have amounted to about $8.

Exhibit 2 contains the proofs of loss. They refer to the fire of April 17. These proofs were sent to the home office, and were referred to Mr. Wilken, the company's adjuster, and he went to South Omaha about May 17 or 18 and saw Gallagher & Nelson, and claimed to them that the policy was void; that the company was not liable, but it was willing to pay something rather than litigate the matter. On the foregoing facts of the case the district court on the first trial gave the jury a peremptory instruction to return a verdict for the plaintiff and against the defendant

in the amount of the policy. It seems to be conceded that the evidence in each trial is along the same line.

It was held by this court at the former hearing (95 Neb. 43), as stated in the syllabus: "Notice and knowledge of the existence of a vacancy in the insured premises, or of the occurrence of a fire in the same, to such an extent as to make them uninhabitable, communicated to the local agent of the defendant, authorized to issue policies and transact the usual business of a recording agency, is the knowledge of the insurance company." The above holding would seem to be important in determining the law applicable. It determines that branch of it at least. The case was reversed, because it was the view of this court, as stated in the body of the opinion, that the case should have been sent to the jury to pass upon the question of fact as to whether notice of the former fire was given to the agent of the defendant. It was also said "that the district court erred in instructing the jury, as a matter of law, that 'the insurance contract * * * was still in force, and recognized at all times afterward as being in force, between the parties,' and in directing it to return a verdict for the plaintiff."

In *Hunt v. State Ins. Co.*, 66 Neb. 125, this court held on rehearing, as stated in the syllabus: "Where a tenant has removed from the insured premises and a loss occurs the same day, within a few hours, whether there was a vacancy, or a mere temporary cessation of occupancy until the tenant could fully remove his effects and some one else could be put in, is a question for the jury." It was further said in the syllabus: "If, with knowledge of the facts by reason whereof it is entitled to claim a forfeiture, the insurer continues to treat the policy as in force, or does any act inconsistent with an intention to insist upon the forfeiture, the forfeiture is waived." In the body of the opinion it is said: "If the insurer, with knowledge of the facts by reason whereof it is entitled to insist upon forfeiture, continues to recognize the policy as in force, or does any act inconsistent with insistence upon the for-

feiture, the forfeiture is waived, and may not be relied upon thereafter"—citing *Slobodisky v. Phœnix Ins. Co.*, 52 Neb. 395; *Phœnix Ins. Co. v. Holcombe*, 57 Neb. 622; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488.

In *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, this court held, as stated in the syllabus: "After a partial loss under a fire policy which renders the building untenantable, the insured is not guilty of a breach of the vacancy clause of the contract where he permits the property to remain unoccupied pending the period during which the insurer is authorized to exercise his option to repair the damaged building." In the body of the opinion it is said: "It could not have been contemplated by the parties that the building should be occupied, when, as a result of its partial destruction by fire, it became unfit for occupancy."

And, as we view the matter, the insurance company had notice of the condition of the building after the conversation of Miss Nelson, of Gallagher & Nelson, with Mr. Dickey, who testified that he called up Senator Gibson of South Omaha, the agent of the insurance company and who wrote the policy, and told him about the fire, and Gibson said "he would look after the matter." This was knowledge imparted to the insurance company.

An examination of the instructions appears to call for a review of the alleged error concerning the giving of instruction No. 2 on the court's own motion. In that instruction the court told the jury: "The one question for the jury to decide in this case is whether or not notice of the fire of March 20, 1910, was given to the said L. C. Gibson, at or shortly after the time of said fire of March 20, 1910, occurred, and the burden of proof is upon the plaintiff to show by a preponderance of the evidence that said notice was given to the said Gibson, and, if she (the plaintiff) has so shown, she will be entitled to recover." The foregoing instruction seems appropriate to the evidence given. It is without error.

The verdict of the jury is fully sustained by the evidence. We believe that the instructions given by the court

are properly applicable to the case. The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., LETTON and FAWCETT, JJ., not sitting.

WENDOLIN GERWICK V. STATE OF NEBRASKA.

FILED MARCH 13, 1915. No. 18929.

1. **Criminal Law**: APPEAL: FINDINGS: EVIDENCE. Where a jury has decided a question of fact properly submitted, and the trial judge has overruled a motion for a new trial, if the record discloses competent evidence on which the finding is based, such finding should not be disturbed by the supreme court, unless upon the whole record it is clearly wrong.
2. **Assault and Battery**: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* sufficient to sustain the verdict.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

H. A. Lambert and *Edwin Falloon*, for plaintiff in error.

Willis E. Reed, Attorney General, and *C. F. Reavis, contra.*

HAMER, J.

The plaintiff in error, Wendolin Gerwick, and hereafter called the defendant, was on the 11th day of November, 1913, charged with making an assault upon Clifford Duerfeldt. The complaint was filed in the office of John D. Spragins, a justice of the peace of Richardson county, where the defendant was found guilty. He appealed to the district court for Richardson county, where, on the 26th day of February, 1914, he was tried on the original charge before Judge Raper and a jury, and was again convicted. He was sentenced to pay a fine of $20 and costs. The case comes here on a petition in error.

It is strenuously contended that the evidence is insufficient to sustain the verdict, and that the verdict is the result of bias and prejudice on the part of the jury.

Clifford Duerfeldt was a boy between 15 and 16 years old. He went with his father, Gus Duerfeldt, and William Rusch to the farm of the defendant Wendolin Gerwick. The father and his son and the hired man were looking for a hog which had strayed from the Duerfeldt premises and was supposed to be on the Gerwick farm. The Gerwick and Duerfeldt places are adjoining farms. The evidence shows ill will between the elder Duerfeldt and the defendant. On the day in question, when the Duerfeldts and the hired man, Rusch, reached the fence between the farms, the elder Duerfeldt and Rusch stopped at the fence, and the boy went inside of the fence a few rods until he reached the defendant's hog house. Gerwick and his two daughters were at work in the hog house separating sows and pigs and shutting them up in separate pens.

The boy testified: "Q. After you got to the fence that marked the beginning of the Gerwick land, who, if any one, went from the fence toward the Gerwick house? A. I did. Q. Where did you go? A. North, towards the house. Q. What were you going for? A. To ask where our hog was? * * * Q. When you got to the hog house, what happened? A. He was in the hog house when I got there. Q. Who? A. Mr. Gerwick. Q. Wendolin Gerwick? A. Yes, sir; and he asked, 'What are you doing here?' I said, I wanted to know where the hog was at, and he said, 'You damn thief,' and he hit me over the head, and I run. Q. What did he hit you with? A. A club, like a broomstick. Q. Which way did you run? A. South. Q. What did you do, if anything, toward screaming or making a noise? A. I cried. Q. What did your father and the hired man do? A. They asked, and I told them. Q. What did they do, stand by the fence or go over? A. They came and got me. Q. How close were you to the fence? A. Half way between the hog house and the fence. Q. When they spoke to you what did you say? A. I said, 'They hit me on the head.' * * * Where was Gerwick when you were run-

ning away? A. He came out of the hog house. Q. What did he have in his hand? A. A club. Q. What did you do when your father and the hired man came to you, if anything? A. He cussed all he could." (It is unnecessary to recite the abusive and vulgar language used. We will therefore omit it.) "Q. On what portion of your body did Gerwick strike you with a club? A. On the left side of my head. Q. What effect, if any, did that have on the left side of your head? A. I had a lump there over two months." The boy testified that the lump was as big as a hen's egg, but he probably exaggerated it, because the other witnesses testified that it was about half as big as a hen's egg.

A photograph of the south and north ends of the hog house was taken and was introduced in evidence by the defendant. The south end shows a window or opening. The heads of the two daughters of the defendant are shown at this opening. There seems to have been an impression that there was a door there, instead of a window, and the witnesses testified that the defendant came out through that door. He could not have come through the door in the natural way. Of course, he could have jumped out of the window, but he could not have walked out of it. There was a door in the north end of the hog house. It was a double door, but if the defendant came out of that door he would necessarily be compelled to walk around the hog house to the south and before he would be visible there. The defendant contends that the boy and his father and the hired man were mistaken as to whether the defendant walked out of the door and then hit the boy with the stick. The witnesses all agree that the boy was hurt. He had a lump on his head. He ran toward his father crying. It is immaterial whether the defendant reached out of that window and hit the boy over the head or whether he came out of the north door and went around to the south end and then struck him. The main question is did he strike him. This question was submitted to a jury under instructions which do not seem to be objection-

able in any way. Apparently the defendant had a fair trial and was properly convicted by sufficient evidence.

Counsel for the defendant make a vigorous contention in their brief that the evidence tending to show that there was bad blood between the defendant and Duerfeldt was objectionable and prejudicial. There is evidence that the defendant threatened Gus Duerfeldt, and said to him, "I will get you yet;" that when he did this he held a club over the elder Duerfeldt's head; that some two years before that the defendant had said, "I will get you one time or the other," and at that time he was threatening the elder Duerfeldt with a club. It is claimed that this sort of evidence was likely to inflame the minds of the jurors and to make them accept the view that the defendant had actually struck the boy with the club as charged. There can be no question under the evidence that there was ill will between these people.

Clifford Duerfeldt testified at one time in his evidence that the defendant stuck a stick out of the door first and then struck him. Of course, he might have stuck the stick out of the window, and could then have hit the boy, if he was standing by the window. We do not have to determine the question of fact. That was determined by the jury. They heard the evidence and saw the witnesses. After hearing the evidence they could not well have been in doubt that the boy was struck. He was struck on the head and rather severely injured. In his normal condition the defendant is probably ashamed of what he did, and perhaps regrets it, but the evidence fully justifies the verdict, and we are unable to discover any reason for setting it aside. It should be remembered that, when a motion for a new trial was heard, the question was submitted to the court as to whether the evidence sustained the verdict. The supreme court is reluctant to order a reversal where there is evidence which tends to sustain the verdict. When the jury has decided a question of fact properly submitted, and the trial judge has overruled a motion for a new trial, then, if the record discloses competent evidence on which the finding may have been based, such finding should not

be disturbed by the supreme court, unless upon the whole record the verdict is clearly wrong. We have examined the bill of exceptions and find the evidence sustains the verdict.

The judgment of the district court is

AFFIRMED.

LETTON and FAWCETT, JJ., not sitting.

PAUL SACCA, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 3, 1915. No. 17702.

1. **Appeal:** WITHDRAWAL OF ISSUE OF NEGLIGENCE. Under all the circumstances of this case, the action of the trial court in withdrawing the question of the child's negligence from the jury was not prejudicial.
2. **Street Railways:** INJURIES TO INFANT: SUFFICIENCY OF EVIDENCE. Evidence reexamined, its substance stated in this opinion and in our former opinion in 96 Neb. 447, *held* sufficient to sustain the verdict and judgment.

REHEARING of case reported in 96 Neb. 447. *Former judgment of reversal set aside, and judgment of district court affirmed.*

MORRISSEY, C. J.

This case is now before us on rehearing. The original opinion, which contains a sufficient statement of the issues, may be found in 96 Neb. 447. Counsel for defendant contended on the original hearing, and still contend, that the pleadings and evidence are insufficient to support the verdict and judgment. On the former hearing the judgment was reversed because, in the view taken of the evidence, it did not show actionable negligence on the part of the defendant. Counsel for plaintiff in a well-written brief now undertake to point out material portions of the evidence which had not been urged upon the attention of the court heretofore.

Plaintiff bases his right to recover on two grounds: First, that the car was being operated at too great a speed under the circumstances; second, that the defendant failed to have its car under proper control.

The schoolhouse was located on a *quasi* business street, and the grounds occupied the entire space between Seventeenth avenue and Seventeenth street, being a short block. The steps leading from the sidewalk to the schoolhouse are near the center of this block, and the children had been in the habit of crossing the street in front of the schoolhouse in place of using the regular foot crossings at each end of the block. This was the custom which had long prevailed and must have been known to the defendant. The school board had adopted no rule governing the action of the children in crossing this street, but the teacher, recognizing the danger, had attempted to establish a rule under which she would restrain the children, and keep them in a body upon the sidewalk until she gave them permission to cross the street car tracks. Her testimony indicates that this rule, or custom, was not always obeyed by the children. The day this accident occurred was the first day of school after vacation; the children were dismissed about 11 o'clock, and at the time there was a car on the north line of track, being the line nearest the schoolhouse, going west, and two cars on the south line of track, one traveling some distance behind the other, going east. The teacher did not give the customary signal for the children to cross, but it appears that one little boy, referred to in the evidence as the "Hungarian boy," ran across the street after the first east-bound car had gone by, and immediately in the rear of the west-bound car. This boy got across the street without injury. The Sacca boy, no doubt inspired by the action of the little Hungarian boy, broke away from the group and attempted also to cross the street, but he was struck by the second east-bound car and severely injured. Defendant contends that the west-bound car and the second east-bound car passed one another almost immediately in front of the schoolhouse steps, and that this little Sacca boy darted

across the street so close to the rear end of the west-bound car that he was not seen, and could not be seen, by the motorman on the east-bound car until the car was within two feet of him, and the motorman so testified. We think, however, that the weight of the testimony shows clearly that the boy did not pass so close to the rear end of the west-bound car as contended for by the defendant. The Hungarian boy left the group on the north side of the street, passed behind the west-bound car, and safely reached the south side. The west-bound car was moving at the usual rate of speed, and it is evident that it must have passed several feet to the west between the time the Hungarian boy crossed the tracks and the time the Sacca boy crossed. The west-bound car having proceeded a considerable distance, there was nothing to obstruct the view of the motorman. Had he been as watchful as the circumstances would appear to require, he would have seen this little Hungarian boy running across the tracks, and this would have put him on his guard and suggested the likelihood of other children following. Whatever may have been the custom of the teacher in keeping the children together until she gave them the signal to cross, it is clear that on this occasion she did not succeed in doing so.

The motorman testified: "When I was proceeding down grade, coming east, before I met the west-bound car, I saw the children standing out on the sidewalk. This was an everyday occurrence. They had been in the habit of standing there every day when I made that trip." The witnesses who have attempted to estimate the speed of the car place it at from five to seven miles an hour, and this, it is contended, negatives a finding that it was running at a high and dangerous rate of speed, or was not under proper control. While this testimony is not orally contradicted, it is shown to be incorrect by the facts surrounding the accident. Witnesses can rarely estimate accurately the speed of a moving vehicle. In this case there was nothing to direct their attention to the speed of the car until the accident became imminent, and then their attention would naturally be fastened upon the boy, and

not upon the speed of the car. The proof discloses that the air brakes were in good order, and that they carried between 70 and 80 pounds of air, and, notwithstanding the fact that the motorman applied the emergency brake, the car traveled, according to the testimony of the motorman, over 40 feet, and, according to the testimony of other witnesses, 80 or 100 feet before it was brought to a stop. There is a slight downgrade at this point, but nevertheless it must have been the speed of the car that prevented the motorman from bringing it to an earlier stop after he applied the emergency brake.

In the condition of this record, the maxim *res ipsa loquitur* may well be applied. This accident occurred at a point on the street which had long been used as a crossing by children of tender years. The motorman had seen them assembled upon the sidewalk. He ought to have seen one of their number run across the street in front of his car. The conditions were such as to put him upon his guard, and he might well have anticipated when the first child crossed that others would attempt to follow him. Under these circumstances, we believe the evidence going to show a high and dangerous rate of speed and lack of control is sufficient to sustain the finding of the jury.

It is urged that the court erred in taking away from the jury the question of contributory negligence on the part of the child. Without attempting to fix the exact age at which a child may be said to be responsible for his acts, and capable of being guilty of negligence, we believe that this child, who was under six years of age, cannot, under all of the circumstances of the case, be charged with negligence, and that the action of the court in withdrawing this question from the jury was not prejudicial. The child was of such tender years that it cannot be deemed in law possessed of sufficient discretion to make it guilty of negligence for its failure to exercise due care for its safety.

Error is assigned for the giving and refusal to give other instructions, but, in the view we take of the case, it would serve no useful purpose to discuss them. Considering the charge as a whole, we are satisfied that the is-

sues were fairly stated to the jury, and submitted to them under a correct rule of the law.

No error being found in the record, the former opinion in this case is set aside, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissenting.

If there was negligence of defendant which was the proximate cause of the boy's injury, plaintiff should recover; otherwise not. The majority opinion disposes of the question whether the defendant was negligent, in these words: "Under these circumstances we believe the evidence going to show a high and dangerous rate of speed and lack of control is sufficient to sustain the finding of the jury." That is, the speed of the car was "high" and there was "lack of control." It is indicated in the opinion that the speed was more than seven miles an hour, but how much more or what the probable rate of speed was, as shown by the evidence, is not stated. This seems a little indefinite as a basis of a charge of negligence. The opinion says that the car traveled, "according to the testimony of the motorman, over 40 feet, and, according to the testimony of other witnesses, 80 or 100 feet before it was brought to a stop." The evidence is greatly strained to derive such a conclusion. A witness who was so near that he could have touched the boy says the car ran about 40 feet after the boy ran against it. He is supported by many witnesses. One witness makes a guess that the car may have run 100 feet, and this overthrows the evidence of many other witnesses, both for plaintiff and defendant, who say the car was running at a rate of from three to five miles an hour. But this is the only reason given for supposing that the speed was great or that the car was not "under control." It is conceded that the boy ran against the car. When he saw the car he was running so fast, and the car was so near, that he could not avoid "running into it." Then the motorman stopped the car within 100 feet. This does not seem to prove that he was not in proper control of his car. Such an allegation must be established

affirmatively if it is to be made a ground for applying the "last clear chance" doctrine. There must be evidence that the boy was in a place of danger, and the motorman saw him, or ought to have seen him, while so situated, and that the motorman failed to use such means to avoid injuring him as an ordinarily prudent person so situated would have used. There is no such evidence.

The opinion says: "We think, however, that the weight of the testimony shows clearly that the boy did not pass so close to the rear end of the west-bound car as contended for by the defendant. * * * The west-bound car having proceeded a considerable distance, there was nothing to obstruct the view of the motorman." The conclusion is that he was not "as watchful as the circumstances would appear to require." If the motorman could have seen the boy, the boy could, of course, have seen the approaching car. That the boy did not see the car is certain. He could not stop himself, but ran right against the car. And so we see the opinion makes an unusual application of the "last clear chance" doctrine. The boy ran against the car and hurt himself. The motorman ought to have seen him and stopped the car, so that the boy could cross the tracks in safety. The boy did not see the car, but he was too young to see cars, and the motorman was old enough to see the boy. And, in explanation of this legal principle, we have in the opinion the statement that the boy was too young to be charged with negligence. This seems to me to be a strange misunderstanding of the legal principle which it seeks to apply in this case. If the defendant is negligent, and that is the proximate cause of the injury, and the plaintiff has arrived at the age of discretion, and was also negligent, which contributed to the injury, his negligence is said to be contributory, and he cannot recover. But if the party injured has not arrived at the age of discretion, and the defendant's negligence was sufficient to cause the injury, the defendant is liable, because in such case the plaintiff cannot be held responsible for contributory negligence. That question, however, was not in this case. The defense was solely that the defendant was not negligent.

To support that defense it is alleged that the boy ran against the car; that the injury was caused solely by the act of the boy, and not by any act or neglect of the defendant. So young a boy may not be guilty of contributory negligence in the technical legal sense of the word, but such a boy could hurt himself by running against a street car. To say that a young boy cannot be careless or negligent and so hurt himself seems very wide of the mark, and an instruction that the jury must not regard the carelessness or negligence of the boy in running into the car would virtually be an instruction to find for the plaintiff. It would be construed to mean that, no matter what the boy did, the defendant must avoid injuring him or pay damages; that is, they must insure the boy against hurting himself, and he not a passenger, but a trespasser.

The opinion does not attempt to explain how the speed of the car could have been the cause of the accident. Of course, if the car had run faster, it would have passed before the boy desired to cross the tracks, and no accident would have occurred; but it is not suggested that it was not running fast enough. To say that, if it had run slower, no accident would have occurred is predicated upon a similar mode of reasoning. If the car had remained at the street crossing, the boy would not have found any obstacle in his way. He ran so near the west-bound train that he did not see the car he ran against until it was too late to stop his momentum. If the car had been moving at two miles an hour, or standing, the result would have been the same. The company owes a duty to the persons who patronize the cars as well as to others, and, if a reckless boy can make his own cause of action by running against a car, we will have such restrictions as will make the service useless, or the cost of maintaining it prohibitive.

BARNES, J., concurs in this dissent.

AGNES PIER, APPELLANT, V. ANTHONY CAULEY ET AL., APPELLEES.

FILED APRIL 3, 1915. No. 18023.

Pleading: PETITION: JOINT DEMURRER. A petition which charges concurrent and inseparable acts of negligence, which result in injury to the patient, against two physicians charged with the care and treatment of the patient, *held* good as against a joint demurrer.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Reversed.*

R. P. Drake and *Allen & Dowling,* for appellant.

A. M. Post and *Albert & Wagner, contra.*

MORRISSEY, C. J.

From the judgment of the district court for Platte county sustaining a demurrer to her petition and dismissing her action, plaintiff appeals. Plaintiff alleges that at all of the dates mentioned in her petition defendant Cauley was a practicing physician and surgeon at Humphrey, Nebraska, and the defendant Allenberger was a practicing physician and surgeon at Columbus, Nebraska; that there was an arrangement, agreement and understanding between the two whereby Cauley, when called in surgical cases, should call Allenberger to aid and co-operate with him in the treatment and care of his patient, and he should charge his patient for the services of each; that on August 3, 1911, the plaintiff, a young woman 18 years of age, met with an accident whereby her leg was broken below the knee; that the fracture caused an incision of the skin to such an extent that the bones protruded from the wound, and dirt and foreign substances were admitted therein. She being young and inexperienced, and so disabled that she was unable to act for herself, her parents on her behalf called the defendant Cauley in his professional capacity, as the petition alleged, "to treat and care for said wound and in-

jury, and the said Anthony Cauley for reward within an hour after said injury arrived at the home of the plaintiff and entered upon and took charge of the plaintiff as his patient with reference to her treatment for said injury; but that said Anthony Cauley negligently and unskilfully omitted to cleanse or remove from said wound said dirt and foreign substances, and negligently and unskilfully failed to properly care for or treat said wound or injury, or reset said broken bones, but on the contrary, and without the knowledge of the plaintiff or of her said parents, negligently and unskilfully permitted said dirt and foreign substances to accumulate and remain in said wound or injury, and, in addition thereto, insisted and urged the plaintiff's parents to cause the removal of the plaintiff at once to a hospital in the city of Columbus, Nebraska, where the defendant Christian A. Allenberger pursuant to said arrangement, agreement and understanding between himself and the said Anthony Cauley, was, by the said Anthony Cauley, called to and came to the bed-side of the plaintiff to care for and aid the said Anthony Cauley in the care of and the treatment for the said injury, and the plaintiff and her parents, being desirous of having a successful treatment of said wound and injury and having confidence in said Anthony Cauley, at once accompanied the plaintiff and the said Anthony Cauley to said city of Columbus, and then and there consented to the said Christian A. Allenberger so coming into the case to treat or aid in the treatment thereof and to perform or aid in the performance of such medical and surgical attendance and treatment as seemed to be necessary, and the said Christian A. Allenberger, did then, pursuant to said arrangement, agreement and understanding between himself and the said Anthony Cauley, assist in the treatment of said case at said time, with the knowledge and consent of the said Anthony Cauley, and pretended to treat and care for the same. * * * That the defendant Christian A. Allenberger with the knowledge and consent of the defendant Anthony Cauley, and pursuant to said arrangement, agree-

ment and understanding with him, continued to unskilfully and negligently treat the plaintiff for said injury for a period of over nine weeks." It is further alleged that, as soon as plaintiff's parents learned her true condition, and of the alleged negligent, unskilful, careless and incompetent treatment, they took her to another surgeon, who amputated her leg, said amputation being necessary to save her life, and that this step was made necessary by the "negligence, unskilfulness and carelessness of said defendant." The petition contains the usual allegations of damages and prays judgment.

To this petition defendants filed a joint demurrer on the following grounds: "The several causes of action therein stated are improperly joined. There is a misjoinder of parties defendant. There is a defect of parties defendant." The demurrer was sustained and the action dismissed.

It is contended by defendants that the petition states two causes of action, one for alleged wrongful acts and omissions of Dr. Cauley, for which he alone is liable, and another for alleged wrongful acts and omissions of Dr. Allenberger, for which he is liable, either exclusively, or jointly with Dr. Cauley.

Our Code provides that its provisions and all proceedings under it shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice. The demurrer in effect admits the truth of all of the allegations of the petition, and it will be noted that the petition alleges that each defendant at the time of the injury was a physician and surgeon; that they "had an arrangement, agreement and understanding with each other whereby in cases where the defendant Anthony Cauley was called in his professional capacity to attend and treat a patient for a wound or physical injury of any kind, and particularly where he was called in a case which needed or required a surgical operation or treatment, he was to call the said defendant Christian A. Allenberger in consultation and to aid and co-operate with him in said treatment and operation and was to charge his patient for the serv-

ices of each of said defendants." The effect of this agreement was to create a limited partnership. No separate cause of action is necessarily stated against Cauley, because the acts of negligence charged were continuing acts, beginning with his first failure to cleanse the wound, and extending throughout the time that the patient was under the care of himself and his special partner, Allenberger. It is clearly alleged that the damage resulted from the unskilful and negligent care and treatment furnished by these defendants.

Counsel for defendants have cited a number of authorities in support of their contention that the petition states two causes of action, one for the wrongful acts and omissions of Dr. Cauley while acting alone, and another for the acts and omissions of the two doctors while acting jointly; but in the cases cited there was no concerted action between the different defendants, but each of the wrongdoers acted independently of all others, although the effect of what they did merged and produced the injury. If defendants acted separately, each independently of the other, there being no concert of action between the two, there would be no joint liability; but if their acts are concurrent and inseparable, and, taken together produced the injury alleged, they are jointly liable therefor.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., dissents.

SEDGWICK, J., not sitting.

A. J. EDMISTON, APPELLEE, V. L. U. HUPP ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18047.

Specific performance is not generally a legal right, but is directed to the sound legal discretion of the court, and it will not be granted where its enforcement would be unjust.

APPEAL from the district court for Saunders county: EDWARD E. GOOD, JUDGE. *Reversed.*

B. E. Hendricks and *Charles H. Slama*, for appellants.

Herman N. Mattley, F. H. Mizera and *C. M. Skiles*, *contra.*

MORRISSEY, C. J.

May 23, 1910, the parties entered into the following contract, which is partly printed and partly written:

"CONTRACT FOR CLOSING SALES.

"This agreement, entered into by and between A. J. Edmiston, as party of the first part, and L. U. Hupp and Richard McCluhan, as party of the second part, WITNESSETH: That said party of the first part has this day bargained and sold, and by these presents does bargain, sell and agree to convey by a good and sufficient warranty deed, January 1, 1911, * * * the following real estate in Sully county, state of South Dakota, to wit: The southeast quarter of section twenty-one in township one hundred thirteen, range seventy-eight.

"It is hereby agreed that said party of the second part is to pay to said party of the first part, as the purchase price of said real estate, the sum of forty-six hundred forty dollars, payable as follows: Two hundred dollars cash, the receipt of which is hereby acknowledged. Three thousand dollars payable January 1, 1911. The parties of the second part hereby assume a mortgage of fourteen hundred forty dollars drawing six per cent. per annum from May

23, 1910. Said party of the first part hereby reserves the following crops now growing on said real estate: "Possession of said real estate to be given on or before the 1st day of January, 1911. Deed to be made and delivered at Morse Bluff, Nebraska, on or before the 1st day of January, 1911.

"Said party of the first part hereby agrees to furnish said party of the second part an abstract of title showing perfect title thereto. Should said abstract show perfect title, said purchase price is to be paid in the manner aforesaid. Should abstract not show perfect title, party of the first part is granted two months in which to perfect the same. Should the abstract disclose a title so defective that same cannot be made perfect, then this contract shall be void, and any and all sums of money paid hereunder shall be repaid to party of the second part. Should either party to this contract fail, neglect or refuse to comply with each and every material agreement herein contained, on his part to be performed, the party so in default shall forfeit and pay over to the party not in default as liquidated damages the sum of one hundred dollars. In witness whereof, said parties have hereunto set their hands this 23d day of May, 1910."

It is claimed by Edmiston, the plaintiff, to be a contract for the sale of the land described. It is claimed by the defendants to be merely an option to purchase; but they insist that if the contract, strictly construed, amounts to a contract for the sale and purchase of the land, nevertheless they understood, it to be a mere option contract, and that it should be so construed, in order that it may meet the mutual intentions of the parties. At the time the contract was made the defendant McCluhan paid the plaintiff $100 in cash, and the defendant Hupp paid him $50 in cash and gave his promissory note for $50. In December following the execution of the contract the plaintiff and his wife executed a warranty deed in due form for the premises, and deposited it, together with an abstract of title, in the bank at Morse Bluff, for delivery to the defendants, with instructions to deliver these papers to the defendants up-

on the payment of the balance stipulated in the contract. The bank notified the defendants of the deposit of the papers, but no money was paid and nothing further was done to complete the transfer. August, 13, 1912, plaintiff brought this action in the district court for Saunders county, praying for specific performance of contract. Trial was had to the court, and a decree entered, holding that the contract was one for the sale and purchase of the real estate described, and entering a decree in favor of plaintiff for specific performance. Defendants appeal.

For some time prior to the making of this contract, the plaintiff was the station agent at Morse Bluff, Nebraksa, and the defendant Hupp was the village barber, but conducted a real estate business as a side line, while the defendant McCluhan was a well-to-do farmer living close to the village. In the spring of that year McCluhan arranged to go to Blunt, South Dakota, near which town this land is located, with a real estate dealer who was offering land in that vicinity for sale. He bought his railroad ticket from plaintiff, and plaintiff gave him the numbers of his land and suggested that he look it over. However, McCluhan did not inspect the land on that occasion. Shortly after the return of McCluhan from South Dakota, Hupp and the plaintiff entered into negotiations, but McCluhan and plaintiff never had any conversation in relation to the agreement. The contract was drawn, at the bank on blanks furnished by Hupp. The defendants testified that they thought they were signing an option contract, and that if they failed to complete the deal they would simply lose $100 each as provided in the final paragraph, or the stipulation in the contract. It is conceded that the defendant Hupp was, and is, insolvent, and his lack of means was, without doubt, known to the plaintiff. Defendants claim that they entered into this agreement, hoping that before the expiration of their option they might be able to sell the land at a profit, and with this in view risked the small payment which they made, but that they never understood that they were bound to pay the balance of the purchase price unless they might so elect. In December following

McCluhan made a second journey to Blunt, South Dakota. The purpose of this second trip is not made entirely plain, but it appears that he inspected this land. He describes it as grazing land, located 16 miles from Blunt, with considerable surface rock, and worth from $18 to $20 an acre. Soon after his return he and plaintiff met and talked over the trip. The full conversation is not given, but plaintiff testifies that he asked Mr. McCluhan to go ahead and complete the deal. He admits, however, that he did not ask him for any money. The evidence also discloses that in December, 1910, before the time for the delivery of the deed, the plaintiff had a talk with one Raitt, in which he told Raitt that he had sold the land to McCluhan and Hupp, and that they had paid him $200, but he did not know whether they were going to lose this money, or whether they would go through and complete the deal; that he needed money, and asked Raitt if he thought there would be any chance of disposing of it, and said he wanted to sell it. The testimony of witness Bucholz is also to the effect that Edmiston told him in December, 1910, that he would like to sell the land.

The issues appear to be narrowed down to the one question: What kind of an agreement did these parties believe they were making? Section 341 of the Code provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Did the plaintiff have the right to suppose that the defendants thought they were entering into a contract which bound them irrevocably to the purchase of the land? He knew that Hupp had little, if any, means. He also had reason to believe that neither of the parties had inspected the land. The clause in the contract providing that, if either party defaulted, he should pay liquidated damages in the sum of $100 might well be understood by men who are not learned in the law to mean that, by forfeiting this amount, they would be relieved from all liability. It stands to reason that the defendant Hupp, who was without means, would

not have made the contract, had he understood it in any other light, nor would the defendant McCluhan have bound himself for the full purchase price without having first inspected the real estate. Men of ordinary prudence do not buy farms without seeing them. We believe the subsequent conduct of the plaintiff indicates that he understood the contract as an option, and knew that the defendants so understood it. Before the time for the final payment had expired, he is shown to have remarked that they might not complete the deal, but might elect to lose the money they had paid, and offered to sell the land to other parties. If he had believed that he had an enforceable contract under which he could compel these people to pay him the balance of the purchase price, he would not have been likely to say that they might conclude to abandon the contract and lose the money they had paid.

Specific performance is not generally a legal right, but is directed to the sound legal discretion of the court, and it will not be granted where its enforcement would be unjust. The plaintiff waited more than two years before bringing this action. It is not necessary to decide, and we do not decide, that by this delay he is barred of any remedy he might have; but it is a circumstance which we feel at liberty to consider in determining the view which the parties themselves took of the contract. Even assuming that the plaintiff believed he had made a contract for the sale of the property, we are constrained to believe that the defendants understood it in quite a different way; that they believed they had taken an option only, and that the plaintiff was aware of the view taken by the defendants.

The decree of the district court is

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

NEBRASKA SEED COMPANY, APPELLEE, V. H. F. HARSH, APPELLANT.

FILED APRIL 3, 1915. No. 18051.

1. **Sales: CONTRACT: NEGOTIATIONS.** A valid contract of sale may be made by correspondence, but courts will not construe as a binding agreement letters which the parties intended only as a preliminary negotiation.

2. ———: **OFFER.** The mere statement of the price at which property is held cannot be understood as an offer to sell.

APPEAL from the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Reversed.*

Hague & Anderbery and *F. L. Carrico*, for appellant.

Ralph E. Adams and *J. L. McPheely, contra.*

MORRISSEY, C. J.

Plaintiff, a corporation, engaged in buying and selling seed in the city of Omaha, Nebraska, brought this action against the defendant, a farmer, residing at Lowell, Kearney county, Nebraska. The petition alleges: "That on the 26th day of April, 1912, the plaintiff purchased of and from the defendant 1,800 bushels of millet seed at the agreed price of $2.25 per hundred-weight, f. o. b. Lowell, Nebraska, which said purchase and contract was evidenced by writing and correspondence passing between the respective parties, of which the following is a copy:

"'Lowell, Nebraska, 4-24-1912.

"'Neb. Seed Co., Omaha, Neb. Gentlemen: I have about 1,800 bu. or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want $2.25 per cwt. for this seed f. o. b. Lowell. Yours truly, H. F. Harsh.'

"Said letter was received by the plaintiff at its place of business in Omaha, Nebraska, on the 26th day of April, 1912, and immediately thereafter the plaintiff telegraphed

to the defendant at Lowell, Nebraska, a copy of which is as follows:

"'4-26-12.

"'H. F. Harsh, Lowell, Neb. Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load. The Nebraska Seed Co.'

"On the same day, to wit, April 26, 1912, the plaintiff, in answer to the letter of the said defendant, wrote to him a letter and deposited the same in the United States mail, directed to the said defendant at Lowell, Nebraska, which said letter was duly stamped, and which the plaintiff charges the defendant in due course of mail received; that a copy of said letter is as follows:

"'4-26-12.

"'Mr. H. F. Harsh, Lowell, Neb. Dear Sir: We received your letter and sample of millet seed this morning and at once wired you as follows: "Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load." We confirm this message. Have booked purchase of you 1,800 bushels of millet seed to be fully equal to sample you sent us at $2.25 per cwt., your track. Please be so kind as to load this seed at once and ship to us at Omaha. We thank you in advance for prompt attention. When anything further in the line of millet to offer, let us have samples. Yours truly, Nebraska Seed Co.'"

It alleges that defendant refused to deliver the seed, after due demand and tender of the purchase price, and prays judgment in the sum of $900. Defendant filed a demurrer, which was overruled. He saved an exception to the ruling, and answered, denying that the petition stated a cause of action; that the correspondence set out constituted a contract, etc. There was a trial to a jury, with verdict and judgment for plaintiff, and defendant appeals.

In our opinion, the letter of defendant cannot be fairly construed into an offer to sell to the plaintiff. After describing the seed, the writer says: "I want $2.25 per cwt.

for this seed f. o. b. Lowell." He does not say I offer to sell to you. The language used is general, and such as may be used in an advertisement, or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted by any or all of the persons addressed.

"If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases." 9 Cyc. 278*e*.

The letter as a whole shows that it was not intended as a final proposition, but as a request for bids. It did not fix a time for delivery, and this seems to have been regarded as one of the essentials by plaintiff, for in his telegram he requests defendant to "wire how soon can load."

"The mere statement of the price at which property is held cannot be understood as an offer to sell." *Knight v. Cooley*, 34 Ia. 218.

The letter of acceptance is not in the terms of the offer. Defendant stated that he had 1,800 bushels or thereabouts. He did not fix a definite and certain amount. It might be 1,800 bushels; it might be more; it might be less; but plaintiff undertook to make an acceptance for 1,800 bushels—no more, no less. Defendant might not have this amount, and therefore be unable to deliver, or he might have a greater amount, and, after filling plaintiff's order, have a quantity of seed left for which he might find no market. We may assume that when he wrote the letter he did not contemplate the sale of more seed than he had, and that he fixed the price on the whole lot, whether it was more or less than 1,800 bushels.

We do not think the correspondence made a complete contract. To so hold where a party sends out letters to a number of dealers would subject him to a suit by each one receiving a letter, or invitation to bid, even though his supply of seed were exhausted. In *Lyman v. Robinson*, 14 Allen (Mass.) 242, 254, the supreme court of Massachusetts has sounded the warning: "Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation."

Holding as we do, that there was no binding contract between the parties, it is unnecessary to discuss the other questions presented. The judgment of the district court is

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

GEORGE P. MCENTIRE ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.*

FILED APRIL 3, 1915. No. 18057.

Carriers: SHIPMENT: LOSS BY FIRE: LIABILITY. When a railroad company has transported a car of freight to the point designated by the shipper, has notified the consignee of the arrival of the car, and given consignee permission to unload the same, and consignee has broken the seal thereon, and locked the door with its own lock, and retained the key, and later a fire occurs in the car and the goods therein are thereby destroyed, *held* that the railroad company is not liable, and it is error for the court to submit the question of liability, negligence being neither alleged nor shown, to the jury.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed and dismissed.*

Paul E. Walker and *Holmes & De Lacy*, for appellant.

Stewart, Williams & Brown, contra.

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* On rehearing, judgment sustained. See opinion, p. 828, *post*.

MORRISSEY, C. J.

The plaintiffs, McEntire Brothers, doing business at Topeka, Kansas, brought this action in the district court for Lancaster County, Nebraska, against the defendant, as the initial carrier, for the loss of a car of furniture shipped by plaintiff from Topeka, Kansas, July 21, 1909, over defendant's line of railroad, and destroyed by fire while still in the car standing on a sidetrack of defendant's connecting line at Blackfoot, Idaho, July 30, 1909. Plaintiffs allege that the furniture was destroyed by fire while in the possession of the defendant as a common carrier, and attach to and make a part of their petition the shipping contract, which contains, among others, the following provisions:

"Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided. No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request

of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession."

"Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman, only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage. The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage."

The answer admits the receipt and destruction of the car, but alleges that the car had been delivered to the consignee and accepted by it while in good condition and before any damage by fire had occurred. A number of other allegations are contained in the answer, but in the view we take of the case they are not material to its determination. There was a trial to a jury, and a verdict and judgment in favor of the plaintiffs for $2,019.53, and defendant appeals.

In making up the car lot, goods belonging to two other parties were included in the shipment; but for the purpose of this case they may be treated as a single shipment

made by the plaintiffs. The goods were consigned to the Brown-Eldrege Furniture Company, a corporation, doing business at Blackfoot, Idaho. The car arrived safely at its destination in the forenoon of July 30, 1909. In the same train also arrived a car of iron bedsteads shipped by a different house to the Brown-Eldrege Furniture Company. Before the arrival of the cars the consignee had received a card from the agent of the railroad company giving notice that the cars were in transit and were about to arrive, and giving the numbers of the cars. Upon the arrival of the cars an agent of the railroad company called the furniture company on the telephone, and notified the secretary of the company that the cars had arrived. The secretary, however, testifies that he understood that only one car had arrived. He asked and received permission to unload the goods and pay the freight later. The car arrived in good order and was spotted on the team siding where convenient for unloading. This was the usual practice and method of delivering freight in car lots. About 1:30 that afternoon, Mr. Peck, a member of the Brown-Eldrege Furniture Company, in company with a drayman, went to the cars, broke the seal and opened the door a foot or eighteen inches on the car containing the Kansas shipment, and left the door standing open the remainder of the afternoon. They then broke the seal and opened the other car and proceeded to unload it. About 6 o'clock that evening Mr. Wilson, secretary of the furniture company, called the railroad office on the telephone and inquired for the agent. The agent being absent, he talked to the operator, and told him that they had broken the seal and opened the door by mistake, and asked him to seal it. The operator replied that "he didn't know anything about the seals." Mr. Wilson says: "I asked him if it would be all right to lock it? He said: 'Yes; go ahead and lock it up." The furniture company then purchased a padlock and sent one of its employees to close and lock the door. This employee closed and locked the door, and retained the key. Within an hour after the door was locked the car was discovered to be burning on the inside. No charge of

negligence is made against the carrier, and the origin of the fire is unknown. It is claimed that the consignee had not taken possession of the goods, and the trial court permitted a member of the firm to testify that they did not intend to accept the shipment until the president of the company, who was absent on the day of the arrival of the car, returned home. Under the court's instructions the jury were told to determine the intention of the consignee. This testimony was incompetent, and the question of intent ought not to have been submitted to the jury. The parties are bound by what they did, and after the loss occurred they cannot be permitted to come in and say they meant to do something different. Had they taken the goods to their warehouse and there the fire broke out and destroyed them, they would not be permitted to say that they were taken by mistake, or that they were to have been left in the car until the president of the company returned home.

Plaintiff insists that, under the shipping contract set out, an absolute liability rests on the carrier for 48 hours after notice of the arrival of the car, or until the consignee has taken actual physical possession of the property by removing it from the car, and that after the 48-hour period the liability of warehouseman exists. But we do not believe the contract susceptible of this construction. A more reasonable construction seems to be that property not removed by the consignee within 48 hours after notice of its arrival may be left in the car, subject to a reasonable charge for storage, and that the liability of the carrier shall be that of warehouseman only. Had the consignee in this case not opened the car or taken possession thereof, but had left it upon the side-track in the condition in which it was received, the carrier would be liable as carrier for the first 48 hours after consignee had notice of its arrival, and for any time it so remained after the expiration of the 48-hour period the carrier would be liable as a warehouseman. Under these conditions and circumstances, the property would be in the possession and under the control of the carrier. But when the consignee broke the lock, put

its own lock on the door, and kept the key, it thereby excluded the carrier from possession of the car, it took possession of the goods, and they were in its possession at the time of the destruction by the fire. The property was so bulky that it did not reasonably admit of an actual, physical transfer, but the carrier, by giving permission to unload, surrendered its control and dominion, there was nothing further for it to do, and the consignee, by breaking the seal and locking the door with its own lock, and retaining the key, assumed control and dominion, and the transfer and delivery was complete. *Rothchild Bros. v. Northern P. R. Co.*, 68 Wash. 527; *Kenny Co. v. Atlantic & W. P. R. Co.*, 122 Ga. 365; *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 38 S. Car. 365, 37 Am. St. Rep. 767; *Kingman St. Louis Implement Co. v. Southern R. Co.*, 133 Mo. App. 317; *Vaughn v. New York, N. H. & H. R. Co.*, 27 R. I. 235. It was error for the trial court to refuse to direct a verdict for the defendant, and the cause is

REVERSED AND DISMISSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JOHN J. DINNEEN, ADMINISTRATOR, APPELLANT, V. AMERICAN INSURANCE COMPANY, APPELLEE.

JOHN J. DINNEEN, ADMINISTRATOR, APPELLANT, V. DELAWARE INSURANCE COMPANY, APPELLEE.

FILED APRIL 3, 1915. No. 17922.

1. **Insurance: CONTRACT: LAWS AND ORDINANCES.** When writing insurance on a building situated within the fire limits of a city, the insurance company is bound by the laws and ordinances of the city, and such laws and ordinances should be considered as a part of the policy.

2. **———: ———: AMOUNT OF RECOVERY: VALUED POLICY LAW: CONSTITUTIONALITY.** When an insured building is injured by fire to such an extent as to destroy its use as a building and require it to be demolished or removed, the insured will be entitled to recover as

for a total loss. Such construction of the valued policy law does not deprive the insurance company of its property without due process of law.

3. ———: ———: VOID CONDITIONS. In such case any condition in the policy providing for the payment of a less sum than the amount of the insurance as written therein is void under the provisions of the valued policy law. Rev. St. 1913, sec. 3210.

4. **New Trial:** MOTION: TIME FOR MAKING. On the trial the jury made special findings of fact without rendering a general verdict. The court discharged the jury, with consent of the parties, and took the case under advisement. The plaintiff excepted to the special findings, and immediately filed a motion to set them aside and for a new trial. After considering the matters of law for some days, the court rendered a judgment in substance as requested by the defendant. Plaintiff, within three days, filed a motion for a new trial. *Held*, that such motion was in time and was a sufficient compliance with the rule.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Reversed.*

James B. Kelkenney and *John E. Quinn*, for appellant.

Baldrige, Keller & Keller, contra.

BARNES, J.

John Kennelly brought two suits in the district court for Douglas county on separate fire insurance policies, but died before the cases were tried. The actions were revived in the name of John J. Dinneen, administrator, and were subsequently consolidated.

It appears that each of the two defendants insured Kennelly against loss by fire to the extent of $1,500 on a three-story frame building situated within the fire limits of the city of Omaha. The insured property was damaged by fire on March 19, 1908. The city of Omaha, pursuant to an ordinance, prevented the repair of the building, and the owner was required to demolish it. Out of what remained after the fire, insured realized $210. Allowing credit for that sum, he demanded from each of the defendants $1,395. Before the loss occurred the value of the building was $5,000. The fire damaged the insured property to the ex-

tent of $1,200. Each of the policies contained the following provisions: "This company shall not be liable for loss caused * * * by order of any civil authority." "This company shall not be liable * * * for loss * * * beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings." In giving effect to these provisions of the policy, the district court rendered judgment against each of the defendants for $640.81, and from those judgments the plaintiff has appealed, claiming that, within the meaning of the contract of insurance and the valued policy act, the property was wholly destroyed, and that he was entitled to recover as for a total loss. Rev. St. 1913, sec. 3210.

Plaintiff contends that, where the property insured is realty, and is wholly destroyed without criminal fault on the part of the owner, the amount of the insurance written in the policy should be taken conclusively to be the true value of the property insured and the true amount and measure of damages. He argues that the statute eliminates from the insurance contract in controversy the conditions of the policies relating to loss occasioned by city ordinances regulating the construction or repair of buildings. It is also argued that existing laws and ordinances are parts of the insurance policies; that the building was damaged by fire beyond repair; and that as a result the insured property was totally destroyed. There is a stipulation in the record which recites, among other things, the following:

"That on the 19th day of March, 1908, while said contracts of insurance were in full force and effect, said building was burned and damaged by fire to such an extent as to require that it should be repaired before being fit for habitation; that said building was located within the fire limits of the city of Omaha; that Charles H. Withnell, building inspector of the city of Omaha, refused to grant plaintiff's application for a permit to repair said building, because, by reason of said fire, he claimed said building had depreciated in value to an extent greater than 50 per cent. of its original value, said building being a frame

structure and within the fire limits of the city of Omaha; that the said building inspector recommended to the city council of the city of Omaha that said building be torn down, and on the 17th day of July, 1908, upon a hearing on said recommendation, said building was condemned and ordered torn down by said city council because, in its opinion, said building was in bad condition and depreciated in value to an extent greater than 50 per cent. of value of similar buildings above foundation by reason of said fire; that plaintiff obeyed the order of the council, and notified defendants of this fact; that plaintiff notified defendants of the refusal of the building inspector to grant a permit to repair said building, and of the condemnation proceedings of the city council."

It was further stipulated, in substance, that the city ordinances pertaining to buildings within fire limits, as published in Thomas' Revised Ordinances 1905, were in effect at the time of the issuance of the policies herein, at the time of the said fire, at the time of the building inspector's refusal to grant said permit to repair and the condemnation proceedings of the city council. It is a well-established rule that a policy insuring against loss or damages by fire covers loss occasioned by a law prohibiting the repair of a building partially destroyed by fire. *Hewins v. London Assurance Corporation*, 184 Mass. 177; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527; *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563, 56 L. R. A. 784; *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 103; *Palatine Ins. Co. v. Nunn*, 99 Miss. 493.

In *Larkin v. Glens Falls Ins. Co., supra*, it was said: "The parties are presumed to know of the ordinances. They directly and materially affect their rights in case of a loss under the policy, and should govern and control in the adjustment and settlement of such loss. 4 Joyce, Insurance, sec. 3170."

In *Hamburg-Bremen Fire Ins. Co. v. Garlington, supra*, it was held: "That the parties having contracted in view

of the ordinance, the fire must be deemed the proximate cause of the loss, and the loss total."

In *Palatine Ins. Co. v. Nunn,* 55 So. 44 (99 Miss. 493), it was said: "A building insured against fire is a 'total loss' where, though only partly burned, it is rendered unfit for the purpose for which it was constructed, and there is an ordinance or law prohibiting reconstruction."

In the note to *Monteleone v. Royal Ins. Co., supra,* as reported in 56 L. R. A. 784, 793, it is said: "Whenever, by reason of the existence of local ordinances or regulations, it is rendered impossible to repair a partially destroyed building, the insured is liable as for a total loss."

Such is the rule in this state. *German Ins. Co. v. Eddy,* 36 Neb. 461; *Home Fire Ins. Co. v. Bean,* 42 Neb. 537; *Insurance Company of North America v. Bachler,* 44 Neb. 549. In the two cases last cited it was said: "Where real property is wholly destroyed by fire, any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced."

The principal question in dispute in this case is whether an insurance company may embody provisions in the policy which provide that it shall not be liable for loss occurring by reason of any ordinance regulating the construction or repair of buildings. This precise point was considered and determined in *New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co.*, 128 La. 45, and in *Palatine Ins. Co. v. Nunn, supra,* and it was held that such provisions were invalid under a valued policy law. Considering the effect of our former decisions as to what constitutes a total loss, and also giving the valued policy law the weight and effect it seems to us that the legislature intended it to have, we must hold that the conditions of the policy limiting the amount of loss are invalid, and that the building was a total loss to the insured. The Massachusetts case (*Hewins v. London Assurance Corporation, supra*), relied upon is not based upon a valued policy law, and is not applicable.

It appears that a jury was impaneled to try the case, and at the conclusion of the testimony the plaintiff requested the court to direct a verdict in his favor for the amounts prayed for in his petitions. The court refused the request, and thereupon the jury were required to answer the following interrogatories: (1) To what extent was the property in dispute injured or damaged by reason of the fire itself of March 19, 1908? The jury answered: $1,200. (2) What was the value of the building insured immediately prior to the fire of March 19, 1908? The jury answered: $5,000. Thereupon they were discharged without having rendered a general verdict. The parties then agreed that the legal questions should be reserved for the decision of the court. The plaintiff at once filed a motion to set aside the findings of the jury and for a new trial, and the court took the case under advisement. On May 27, 1912, the court rendered the judgments of which the plaintiff complains. On the 29th day of May a motion for a new trial was filed and overruled, and the plaintiff thereupon perfected his appeal. As we view the record, the court erred in refusing plaintiff's request for a directed verdict as prayed for in his petitions, and defendants' contention that plaintiff failed to file his motion for a new trial within the time provided by statute cannot be sustained.

Finally, it is contended by the defendants that they were not brought before the building inspector or the city council at the time the orders were made refusing the plaintiff the right to repair the building and requiring the same to be demolished. Therefore to require them to pay the amount of the insurance named in the policies is, in effect, taking their property without due process of law. The stipulation shows that defendants had knowledge of the proceedings, but it is true that no summons or other written notice was ever served upon them requiring them to appear and defend against said finding and order. The ordinance contains no provisions for the service of such a notice. At most, the findings and order were mere ministerial or administrative acts, and were within the reason-

able discretion of the city authorities. If the injury to the building by the fire was so slight, and the repairs necessary so trifling that the action of the authorities in condemning the property was beyond all reason, they might have been restrained by a court of equity. Therefore this contention is not well founded.

It follows from what has been said that the conditions contained in the policies limiting the recovery to an amount less than is provided by the valued policy law are void. The trial court should have rendered judgment for the amounts claimed in plaintiff's petitions.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

LETTON, J., concurring.

We have held in this state repeatedly that it is not essential that a structure be totally destroyed in order to make the company liable for a total loss; it is enough that it be destroyed as a building. Other courts, upon good reason, have held that, when it was destroyed as a building by reason of the restrictions of building ordinances, it was a total loss. Our valued policy act provides: "The amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured *and the true amount of loss and measure of damages.*" Rev. St. 1913, sec. 3210. The insurance company had knowledge of this act when it made the contract, and might have adjusted, and perhaps did adjust, its premium rate to meet the liability. It seems to me that the provision written in the policy to the effect that the amount of insurance shall not be taken to be the true amount of loss violates this statute.

FAWCETT, J., dissenting.

I have no quarrel with the rule announced in the first paragraph of the syllabus of the majority opinion, that, "when writing insurance on a building situated within the fire limits of a city, the insurance company is bound by the laws and ordinances of the city, and such laws and ordi-

nances should be considered as a part of the policy," but I think the rule should work both ways, and hold that the owner of a building situated within such fire limits should also be bound by the ordinances of the city, and that such ordinances should be considered as a part of the policy he accepts from the insurance company. He knows, as well as the company, that, when a frame building situate within the fire limits is damaged 50 per cent. of its value, it cannot be repaired, but will be ordered torn down and removed. Both the insurance company and the assured, therefore, in entering into a contract of insurance, have the ordinance before them, and the simple question in this case is: May they enter into a contract, binding upon both, that the assured will assume the risk of having his building torn down after it has suffered a partial loss by fire, and that the insurance company will assume the risk of loss actually caused by the fire, but will not assume the risk of loss or damage to the building over and above that caused thereby, which may be occasioned by the action of the city authorities in ordering the building destroyed? Each of the contracting parties understands fully the part which fire may play in the destruction of such a building, and the part which the ordinance of the city may play in causing such destruction. The company assumes the risk of the former, and the assured of the latter. Is such a contract prohibited by the valued policy act? I think not. In such cases I think the rule is, and should be, that insurance against damage by fire protects the insured against loss resulting from the enforcement of an ordinance prohibiting the repair of his building after its partial destruction by fire, in the absence, and *only* in the absence, of an agreement to the contrary. *Hewins v. London Assurance Corporation,* 184 Mass. 177, 182. The provision in controversy relates to the causes of loss and the character, as well as the extent, of the insurer's risk or liability. On these matters parties may make their own agreements, unless they are hampered by valid legislation. A statute restricting the right of contract, as the valued policy law, should not be extended by implication or con-

struction beyond its import and purposes as disclosed by the language of the lawmakers. The purpose of the valued policy act is to prevent insurance at an overvaluation, and to deter insurers from taking reckless risks, by prohibiting them, after a total loss, from claiming that, at the time of issuing the policy, the value of the insured property was not equal to the amount of the insurance. Here the value of the property when the policy was issued and when the fire started is not questioned. The question here is the character of the risk assumed by the company. The statute by its own terms applies to insurance on property wholly destroyed. Where there is only a partial loss by fire, and the damaged building is for that reason demolished under police ordinances, enacted to protect the public against future fires, the character of the risk to be assumed by an insurance company is a lawful subject of contract. If a property owner desires insurance, limited to fire alone, intending to carry his own risk in so far as a city may prevent him from repairing a building partially destroyed by fire, how can he procure such indemnity if he cannot make a lawful contract including those terms? They are not inconsistent with the valued policy act, and there is nothing in the policy indicating a purpose to violate the law or to mislead or defraud the insured. It is a plain, straightforward, honest contract, voluntarily entered into between the parties, and the district court was right in enforcing it as the parties had made it.

ROSE, J., joins in dissent.

EDWARD P. HOLMES, APPELLEE, V. JOSEPH R. WEBSTER ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18018.

1. **Creditors' Suit.** There must be a valid and enforceable judgment as a basis for a creditor's suit to set aside an alleged fraudulent transfer of real estate.

2. **Judgment: REVIVOR.** A judgment of the federal court, when dormant, can only be revived in the court where it was rendered.

3. **Limitation of Actions: DOMESTIC JUDGMENT.** No action can be maintained on a domestic judgment which is dormant and has not been properly revived, unless commenced within five years after the judgment was rendered.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed and dismissed.*

H. F. Rose, and *C. S. Allen,* for appellants.

J. A. Brown, contra.

BARNES, J.

Appeal from a decree of the district court for Lancaster county in a creditor's suit to subject certain real estate to the payment of a judgment or decree of the federal court for the district of Nebraska.

The record discloses that the judgment of the federal court, which is the basis of the decree herein, was rendered on April 16, 1894. Fourteen years after the judgment was rendered in the federal court, the plaintiff in this case procured a certified transcript thereof from the clerk of that court and caused it to be filed in the office of the clerk of the district court for Lancaster county. Thereafter the plaintiff commenced proceedings in the state court to revive the judgment. The defendant Joseph R. Webster entered a special appearance objecting to the jurisdiction of the court. His objections were overruled, and he did not further appear. The state court entered an order reviving the judgment, and on the 20th day of May, 1909, Holmes filed his petition in this case, setting forth, in substance, the foregoing facts, and alleging the facts which he claimed enabled him to enforce the judgment, and further alleging that defendant Joseph R. Webster had fraudulently conveyed his property. He prayed for a decree setting aside the deeds and subjecting the real estate to sale for the purpose of paying the amount due him upon the judgment rendered by the federal court. To the petition the defendants, Joseph R. Webster and Joy L. Web-

ster, filed separate answers challenging the validity of the judgment of the federal court, the order of revivor entered by the state court, denying fraud in the conveyance, and all of the other allegations of plaintiff's petition. A trial resulted in a finding and judgment for the plaintiff, and the defendants have appealed.

Appellants strenuously contend that the decree is not sustained by the evidence and is contrary to law. As a basis for a creditor's suit, the plaintiff must have a valid and enforceable judgment against the principal defendant, and without the existence of such a judgment his action must fail. The judgment of the federal court, which is the basis of this suit, was rendered more than 14 years before it was transcribed to the district court for Lancaster county. No execution had ever been issued thereon, and no proceedings had ever been instituted to revive it. After it was transcribed to the state court, there was an attempt, in that court, to revive the judgment. The defendant objected to the jurisdiction of the court to make an order of revivor, and, as we view the question the objection should have been sustained. In *Case Threshing Machine Co. v. Edmisten*, 85 Neb. 272, it was said: "A district court in which the transcript of a judgment of another district court has been filed is without authority to revive the judgment by the statutory method of revival created by section 473 of the Code, such power remaining in the court of original jurisdiction." We have recently overruled *Snell v. Rue*, 72 Neb. 571 (see *Armstrong v. Patterson*, 97 Neb. 229), and held that a judgment is barred by the statute of limitations after five years, and no action can be maintained on such a judgment. It follows that, the judgment not having been revived, the action thereon is barred by the statute of limitations, and the decree complained of cannot be sustained.

The judgment of the district court is reversed and the plaintiff's action is dismissed.

REVERSED AND DISMISSED.

LETTON and ROSE, JJ., not sitting.

ANGUS CATTLE COMPANY, APPELLANT, V. GILMORE MCLEOD ET AL., APPELLEES.

FILED APRIL 3, 1915. No. 18067.

1. **Animals: TRESPASS: LIABILITY.** Section 109, Rev. St. 1913, provides, among other things, that "the owners of cattle, horses, mules, swine and sheep in this state, shall hereafter be liable for all damages done by such stock upon the cultivated lands" of another.
2. **———: ———: ———: LIEN.** An action will not lie in this state for damages done by cattle, mules, swine or sheep ranging at large upon uncultivated lands; but, if the owner of such stock drives them upon the lands of another, he is liable for all the damages done by them while there, and the owner of the land who takes up and impounds such trespassing animals has a lien on them to the amount of the damages done by them and for the value of the care and feed of such animals while they are impounded.
3. **———: ———: ———.** A cornfield is cultivated land within the meaning of the statute, and the owner of live stock is liable for the damages caused by such live stock while they are trespassing upon such cultivated land.

APPEAL from the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

A. W. Scattergood, John N. Tucker and *J. H. Broady*, for appellant.

Switzler, Goss & Switzler and *Walcott & Walcott, contra.*

BARNES, J.

Appeal from a judgment of the district court for Cherry county in an action of replevin.

It appears that the plaintiff and the defendant John W. Collins are the owners of adjoining cattle ranches in Cherry county, and Gilmore McLeod is Collins' foreman; that defendant's ranch was inclosed by a fence, but the plaintiff, having purchased a tract of land adjoining the defendant's premises on the east, had removed a line of fence about three-eighths of a mile in length along or near

the east side of defendant's meadow. On the 11th day of April, 1912, plaintiff turned its stock out to graze on its own land adjoining defendant's meadow. About 200 head of the cattle came onto the meadow, which was soft, tramped it up, and otherwise injured the land. Defendants notified plaintiff of that fact, and asked it to keep its cattle away from their premises. Plaintiff refused to comply with the request, and there is evidence in the record tending to show that its cattle were driven onto defendant's land. This course continued from day to day until the 17th of April, 1912, when defendants found some of plaintiff's cattle in their cornfield feeding on their cornstalks. The defendants thereupon took up 54 head of plaintiff's cattle, confined them in their corral, and drove the rest of the herd away in the direction of plaintiff's ranch buildings. The defendants thereupon served a written notice on plaintiff that they had impounded the 54 head of cattle and claimed damages for and on account of the trespass. Plaintiff received the notice, and went to defendant's premises, where certain negotiations took place. The defendants named an arbitrator to assess their damages, but the plaintiff failed to complete the negotiations, and on the 22d day of April, 1912, replevied its cattle. Issues were joined, a jury was waived, and the case was tried to the court. The result of the trial was a finding that defendants were entitled to the possession of the cattle and had a lien on them for $100. The usual judgment in replevin was awarded defendants, and plaintiff has appealed.

The appellant contends that the findings and judgment are not supported by the evidence and are contrary to law. In support of this contention the appellant cites *Delaney v. Errickson*, 10 Neb. 492, and *Meyers v. Menter*, 63 Neb. 427, where it is said: "An action will not lie in this state for damages done by cattle, mules, swine or sheep ranging at large upon uncultivated land." As we view these cases, they are not decisive of the question presented by this appeal. There was a motion for a rehearing in *Delaney v. Errickson*, and the opinion on the rehearing is reported

in 11 Neb. 533. It was there said: "While the owner of domestic animals may lawfully permit them to *wander* upon and depasture the uninclosed, uncultivated lands of others, he has no right to drive them there without the owner's permission, and if he do so he is answerable for whatever damage they may do while there." In *Meyers v. Menter, supra,* it was held that plaintiff was entitled to recover because a part of the land upon which defendant's cattle trespassed was cultivated land on which certain crops were growing which were not spontaneous products of the soil. It clearly appears in the instant case that defendants had between 20 and 30 acres of their land which had been planted to corn, and the stalks, still standing thereon, were used as feed for their stock; that at the time defendants took up the plaintiff's cattle they were trespassing upon this cultivated field. Again, it is shown by the testimony of some of defendants' witnesses that the plaintiff's cattle were driven upon defendant's meadow, which had been used for cutting hay for many years, and defendants had some stacks of hay thereon from which plaintiff's cattle were feeding. Section 109, Rev. St. 1913, provides: "The owners of cattle, horses, mules, swine and sheep in this state, shall hereafter be liable for all damages done by such stock upon the cultivated lands in this state." we are therefore of opinion that the evidence was sufficient to sustain the findings. It also appears that after defendants impounded plaintiff's cattle they fed them hay and cared for them until they were taken upon the writ of replevin. The defendants were clearly entitled to a lien for the value of feed and care, together with the damages to the meadow and cultivated land.

It follows that the judgment of the district court was right, and should be affirmed.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., LETTON and SEDGWICK, JJ., not sitting.

MINNIE WARNER METTLER ET AL., APPELLEES, V. ISABELLA R. WARNER, APPELLANT; VESPASIAN WARNER ET AL., APPELLEES.

FILED APRIL 3, 1915. No. 18075.

1. **Wills:** ELECTION. A widow of one who dies testate in a sister state, and who has in the courts of the state of his domicile elected to renounce the provisions of his will made for her benefit and take her dower in his estate, the election having been held valid, is entitled to claim dower in the estate of her deceased husband which is situated in this state.
2. ———: ———: LIMITATIONS. Her election in the courts of the state of his domicile is, in effect, the commencement of proceedings to recover dower, and an action may be brought by her to assign the same in the courts of this state when her right of dower in the estate situated here is challenged by the heirs of the testator.
3. **Judgment:** COMITY: ANTENUPTIAL AGREEMENT. Where the courts of the state in which the testator was domiciled at the time of his death have disregarded an antenuptial agreement and have assigned dower to the widow, the courts of this state will disregard such agreement.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Tibbets, Anderson & Baylor, for appellant.

Burkett, Wilson & Brown, contra.

BARNES, J.

This appeal involves the right of Isabella R. Warner, the widow of John Warner, who died testate at his home in Clinton, Illinois, to a dower interest in certain real estate situated in Lancaster county, Nebraska. At the time of the death of John Warner he was the owner of a large estate, consisting of land and personal property situated in Dewitt county, Illinois, where he then resided, and where he had resided during all of his life. He was also the owner of real estate in Iowa, Ohio, California and Nebraska. The deceased left surviving him two children

by a former wife, his widow, and two children by her. By the terms of his will he devised to his widow the family homestead, situated in the city of Clinton, and $10,000 in money, to be paid to her by the executor of the will. When the will was presented for probate in Dewitt county, Illinois, the widow filed her election to renounce the provisions of the will made in her favor, and claimed the right to take a dower interest in her deceased husband's estate, which amounted at the time of his death to $1,650,000. The circuit court of Dewitt county held that she had made her election within one year after her husband's death and established her right of dower. The executor appealed to the supreme court of Illinois, where the judgment of the circuit court was affirmed. Afterwards the widow established her right to dower in the lands of her deceased husband situated in the states of Iowa and Ohio in the courts of those states. Three years and two months after the death of John Warner his children by his first wife commenced an action to partition that part of his estate situated in Nebraska in the district court for Lancaster county. The widow appeared and filed an answer and cross-bill, claiming her right of dower therein. Thereupon the plaintiffs withdrew their petitions and filed answers to her cross-bill. The cause was tried on issues thus joined, and the district court held that the widow's claim was barred by the provisions of section 18, ch. 23, Comp. St. 1905, and dismissed her action. The widow has appealed, and contends that her election to renounce the provisions of the will and take her dower in the estate of her deceased husband, made in the state of Illinois, and the confirmation by the courts of that state, was a sufficient election and fixed her status as to her husband's estate wherever situated; that her election was seasonably made in point of time; and that the court erred in dismissing her cross-petition.

In *Hawley & King v. James*, 5 Paige Ch. (N. Y.) 318, 446, the court said: "The object of the legislature undoubtedly was to compel the widow to make her election to take her dower, instead of the jointure or other provi-

sion made in lieu thereof, within a limited period after the death of the husband, and by some open and notorious act which could not be misunderstood. * * * Neither is it necessary, by the statute, that the widow should make an entry upon or commence proceedings for the recovery or assignment of her dower in every separate and distinct parcel of the lands in which she is entitled to claim dower, in order to constitute a valid election on her part to reject the provision made by her husband in lieu of such dower. But it will be sufficient, where she has taken no part of such provision made for her in lieu of dower, if she actually commences proceedings within the year, for the recovery or assignment of her dower in any part of the lands as to which the right of election exists, or enters upon any part of such lands, claiming her dower therein." In *Wilson v. Cox*, 49 Miss. 538, the eighth paragraph of the syllabus is: "A will disposing of property, in two or more jurisdictions, ought to have uniform effect as to all the beneficiaries under it. That cannot be done unless it pertains to the forum of the domicile, to give to the widow the election to accept under the will or to abandon it, and take under the law:" It is held in the opinion that no other election is necessary than at the domicile. There are several other cases that hold the same, and we think these are reasonable rules and a reasonable construction of our statute. *Washburn v. Van Steenwyk*, 32 Minn. 336, and *Slaughter v. Garland*, 40 Miss. 172, are in point upon this question. In the last cited case it is said (p. 180); "But the right of renunciation is available only in the proper tribunal of the testator's domicile. It is an incident to the jurisdiction of the tribunal which has the exclusive power to admit the will to probate, and proceeds from the jurisdiction over the matter of probate. Otherwise there might be a renunciation of the will in a foreign state, while it would be in full force in the state of the domicile; which would be absurd. The tribunal having jurisdiction, both of the probate and of the incident of revocation, is manifestly the proper court of the domicile of the testator."

It seems clear that the provisions of our statutes are not in conflict with the foregoing authorities. The section on which the decision appealed from is based is found in the chapter providing for the distribution of estates of deceased persons domiciled in this state, and was not intended to apply to the estates of persons domiciled in other states. The legislature did not intend to limit the widow, in such cases, to one year in which to assert her rights in this state. We think that, where the widow has renounced the will and has established her right of dower in the courts of her deceased husband's domicile within one year, her election thus made is a sufficient commencement of proceedings to recover dower, and entitles her to maintain an action for that purpose in the real estate of which her husband died seized, whenever the heirs attempt to claim all the estate in the courts of this state.

The trial court found, among other things, that an antenuptial agreement was made between the widow and her husband at the time of their marriage, but the decision was not based on that agreement. It appears that the agreement had been disregarded by the parties to it for more than 30 years of their married life, and the courts of the state of their domicile had disregarded it. As a matter of comity, the courts of this state should take the same view of that agreement. The appellees have cited *Apperson v. Bolton*, 29 Ark. 418, and seem to rely upon that decision. By the statutes of that state the widow, in order to claim dower, is required, first, to make an entry upon the land situated in that state; and, second, to commence proceedings for the recovery of assignment of her dower therein. It was said in the opinion that she would not be permitted to claim against a will and accept its provisions at the same time, and that an acceptance of the provisions of the will in Tennessee, the state of the domicile, would bind her everywhere. The statutes of Arkansas are so different from ours that we think the decision is not in point.

It follows that the judgment of the district court should be reversed and the cause remanded for further proceed-

ings in accordance with the views expressed in this opinion.

JUDGMENT ACCORDINGLY.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

ISAAC R. SINCLAIR, APPELLANT, V. WILLIAM E. DUNNING, APPELLEE.

FILED APRIL 3, 1915. No. 18083.

1. **Appeal: CONFLICTING EVIDENCE.** The verdict of a jury rendered on conflicting evidence, where the issues have been submitted under proper instructions, will not be set aside by a reviewing court unless it appears to be clearly wrong.
2. **Instruction complained of, set forth in the opinion, and *held* to have been properly given.**

APPEAL from the district court for Phelps county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Dravo & Dilworth, for appellant.

G. Norberg and *Ralph E. Adams, contra.*

BARNES, J.

Action to recover damages alleged to have been sustained by plaintiff by reason of the fraud and deceit of defendant in the exchange of 148 acres of land situated in Nance county, Nebraska, for a stock of merchandise in Eustis in said state. The cause was tried to a jury in the district court for Phelps county. The defendant had a verdict and judgment, and plaintiff has appealed.

The plaintiff alleged in his petition that in the negotiations leading up to the trade the defendant told him that his land was worth $100 an acre, and that he had been offered $95 an acre for it; that plaintiff could obtain a loan on it for $6,000 from a widow in St. Edwards, Nebraska, by the name of Elberta Cain. Plaintiff alleged

that he had no knowledge of the value of the land and relied on the defendant's statements, which induced him to make the trade; that said statements were false and untrue, which fact was well known to defendant at the time they were made; that the land was not worth more than $35 an acre; that after plaintiff traded for the land he was unable to obtain a loan of $6,000 thereon, and that, by reason of the fraud and deceit practiced on him by defendant, he had been damaged in the sum of $10,061, for which he prayed judgment.

The defendant, by his answer, admitted that he traded the land in question for the stock of merchandise mentioned in plaintiff's petition, but denied that he made the representations set forth therein, and alleged that the trade was made after plaintiff had visited the land and had examined it to his own satisfaction, and after he had made inquiries of other persons who resided in the vicinity where the land lay. He further alleged that the stock of merchandise which he took in trade for the land was what is known as "trading stock;" that he told plaintiff that he wanted $14,800 for his land, and that plaintiff must allow him that amount in case they made the trade. He denied that he ever told plaintiff that Elberta Cain would loan him $6,000 on the land, and alleged that he informed plaintiff that he probably could obtain a loan from a widow named Cain, living at St. Edwards, Nebraska, for 40 per cent. of the actual value of the land. Further answering, defendant denied all of the other allegations of the petition.

Plaintiff, by his reply, denied the material allegations of the answer.

The appellant contends that the verdict of the jury is not sustained by the evidence. The bill of exceptions discloses that in the latter part of April, 1910, the parties, who both appear to have been traders of land for stocks of merchandise, met, and negotiations were entered into which led up to the trade out of which this action afterwards arose. Plaintiff wanted to know if defendant had land which he would trade for a stock of goods. It appears

that defendant had a fractional quarter section of land, containing 148 acres, in Nance county, which he was willing to trade for plaintiff's stock of goods. He told plaintiff to go down there and examine it. They thereupon fixed a date when they should go to Nance county for that purpose. When they arrived at Palmer, which is a small town in Merrick county near the tract of land in question, they drove out and examined it. The plaintiff was satisfied with the appearance of the land, and on the trial testified that defendant told him it was well worth $100 an acre, while the defendant just as positively testified that he never said it was worth that or any other sum; that he did say that he wanted $14,800 in trade, and that plaintiff could take it or let it alone. Plaintiff testified that defendant told him he could get a loan of $6,000 on the land; that defendant referred him to Elberta Cain, who, it appears, was the mother-in-law of defendant's daughter. Defendant testified positively that he never told plaintiff he could get a loan of $6,000 on the land, but that he told plaintiff that he could probably get a loan of 40 per cent. of the actual value of the land, and referred plaintiff to a widow by the name of Elberta Cain, living at St. Edwards, Nebraska, who was loaning money on real estate,

It appears that when the parties returned from inspecting the land plaintiff made inquiries regarding it of a Mr. Templin, a banker at Palmer who owned land adjoining it, and thereafter requested that he be given a little time to consider the matter of the trade. This was agreeable to the defendant. It also appears that the plaintiff wrote to Elberta Cain and received an answer as follows:

"May 9, 1910. Dear Sir: Yours of May 6 received and think the land you asked about is fully worth what Mr. Dunning asked as it is a great hay producer. I know where all the land is located but do not know the numbers. I would be pleased to make a loan on the land. Would loan 40% of actual purchase price at 6% annually. However, if there is already some incumbrance I would have

to pay it off and deduct from the amount. Mrs. Elberta Cain. P. S. If I could do anything for you in way of a loan let me know as soon as possible."

There is another letter in the record from Mrs. Cain, which reads as follows: "St. Edwards, Neb., May 25, 10. Mr. Sinclair, Smithfield, Neb. Dear Sir: Yours rec'd. Will look over the land and write you as soon as possible. Most Resp., Mrs. Elberta Cain."

Plaintiff testified that after the receipt of these letters he wrote again to Mrs. Cain and received no answer, but it is not shown that he ever made any application for a loan on the land after he procured it.

In the latter part of May, 1910, the parties got together and completed the trade. The defendant's land was considered to be worth $14,800 in the trade. An inventory of the stock of goods was taken, with the result that it was considered to be worth $17,509.99. Defendant gave a note to the plaintiff for the difference, less the amount of certain bills of wholesalers which he assumed and agreed to pay, and the plaintiff gave the defendant a bill of sale for the stock of merchandise, and defendant deeded the land to L. L. Sinclair, who is a son of the plaintiff. Later on the plaintiff sold the note to a bank in Bertrand, and nothing further was heard about the transaction until the commencement of this suit, which was something like two years after the trade was completed.

At the trial the plaintiff produced a writing, signed by the defendant, which contained a statement of the bills which the defendant assumed and agreed to pay, all of which were entered on the left-hand side of the double line on a page of a double-entry ledger and amounted in all to $748.48. This list of accounts the defendant assumed and agreed to pay and appended his signature thereto. When this writing was introduced in evidence, there appeared on the right-hand side of the double-entry column the following:

"Assumed by W. E. Dunning. I hereby agree to give clear title to said land and guarantee a loan of $6,000 on said land by Alberta Cain of St. Edwards, Neb. And also

guarantee full face at First National Bank at Bertrand for difference on note given on said stock of merchandise and I hereby assume the above bills."

The defendant contended that the writing on the right-hand side of the double-entry column was not there when he appended his signature to the bills which he had assumed and agreed to pay. He testified to this positively, and several other witnesses who were present when the writing was signed testified that the writing at the right of the double-entry column was not there when the defendant signed it. The plaintiff denied this, and claimed that it was all written and signed at the same time. It is quite probable that the jury believed the defendant's testimony, and, if so, the belief would go far to sustain the verdict which they rendered. The evidence shows that the land was not worth to exceed $35 or $40 an acre at the time the trade was made. It was good hay land and afforded a hay crop amounting from year to year to from 90 to 180 tons. The testimony as to the value of the stock of goods was conflicting. There was considerable evidence which showed that the bulk of the stock was old and considerably shelf worn. The note which defendant gave to the plaintiff at the time of the completion of the trade, and which amounted to $2,071, was cashed by the plaintiff. There is no evidence in the record from which the jury could conclude that the plaintiff had ever offered to rescind the trade. On the other hand, it seems clear that plaintiff induced the defendant to make the deed, not to himself, but to his son, who took possession of the land, and, so far as the record shows, still owns it. There is a sharp conflict in the evidence as to the representations alleged to have been made by the defendant relating to the condition and value of the land, and also as to the facts relating to the whole transaction. The cause having been properly submitted to the jury upon such conflicting evidence, we are unable to say that it was not sufficient to sustain the verdict.

It is further contended that the trial court erred in excluding the evidence offered by plaintiff in relation to his

offer to rescind the contract. When it is considered that this was not an action for rescission, but was one affirming the contract and seeking to recover damages for fraud and deceit, it must be apparent that such offer was wholly immaterial, and this evidence was properly excluded.

It is also contended that the court erred in giving the eighth paragraph of his instructions to the jury, which reads as follows: "The court instructs you, gentlemen of the jury, that no evidence has been offered by plaintiff tending to show any damages he may have sustained by reason of not having obtained a loan on the real estate in question for $6,000, which plaintiff claims he is entitled to recover. In determining the amount of his recovery you will not take into consideration any damages resulting from the failure of the plaintiff to secure said loan." It clearly appears from the record that the plaintiff never applied to any one for a loan on the land in question. As above stated, he induced the defendant to deed the land to his son, who, so far as the record shows, still owns it, and who has never made any complaint in regard to the transaction. The instruction complained of was properly given.

As we view the record, the cause was fairly tried and submitted to the jury under proper instructions. The judgment of the district court is therefore

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

ALLIE W. PIERCE, APPELLEE, V. ANTOINETTE DOMON, APPELLANT.

FILED APRIL 3, 1915. No. 18045.

1. **Briefs** in this court should be prepared in accordance with rule 12 (94 Neb. XI), otherwise the court may refuse to consider them.

2. **Brokers: CONTRACT: VALIDITY.** When an oral contract is made with an agent for the sale of real estate upon commission, and after-

wards, in order to satisfy the requirements of section 2628, Rev. St. 1913, the contract is reduced to writing before suit is brought, such written contract furnishes the legal evidence necessary that the contract may be enforced.

3. ———: ———: PAROL EVIDENCE. Where it is claimed that such contract was signed by the defendant without knowledge of its contents, evidence of the oral contract previously made is admissible as tending to show the consideration for the writing and the probability that the signer knew its contents.

APPEAL from the district court for Valley county: JAMES R. HANNA, JUDGE. *Affirmed.*

A. Norman, for appellant.

Claude A. Davis, contra.

LETTON, J.

Action by a real estate agent to recover a commission for the sale of land due him under the terms of a written contract. The answer was a general denial, with a a plea that defendant signed the written contract in ignorance of its contents. The jury found for plaintiff, and defendant appeals.

The testimony on behalf of plaintiff tends to prove that the defendant, in a conversation with him at her home, employed him as her agent to sell 70 acres of land; that on the same day he tried to make a sale of the land to one Steinwart, who did not then buy, but who a short time afterwards completed negotiations with the defendant herself. After they had reached an agreement, but before any papers were executed, plaintiff procured defendant to execute the written contract on the same terms as the oral one had been entered into. Defendant afterwards refused to comply with its terms and pay the stipulated commission.

The defendant denies that any oral agreement was entered into, and says that she signed the written contract under a misconception of its contents; that it was not read to her, and she could not read it on account of not having her glasses with her. But it was signed at the office of her

attorney in the presence of one of her granddaughters and husband, and after it had been read and an amendment made by her counsel, who testified that Mrs. Domon came to his office before plaintiff and talked to him about it.

The jury evidently believed the plaintiff's witnesses and found accordingly. There were only two material facts in dispute: (1) Whether plaintiff was ever employed to sell the land; (2) whether Mrs. Domon signed the written contract with knowledge of its contents. As to both of these questions the evidence supports the verdict.

It is difficult to tell what errors are relied upon for reversal, since the brief of defendant is not prepared in accordance with rule 12. The work of this court is expedited by an adherence to this rule, and the court may refuse to consider briefs not prepared in accordance therewith. But the brief and the record in this case are short, and will be considered as if the rule had been observed. It is said that, if the verdict is not supported by the evidence with respect to the oral contract, there is no evidence to support it, and it is argued that, if the appellant made the verbal contract, then she knowingly made the written one, but that, if she did not make the verbal contract and had never employed plaintiff to sell her land, then she would not knowingly enter into the written agreement. The conclusion is drawn that the whole case rests solely upon the oral testimony, and that this is inadmissible under the statute. The answer admits the execution of the written instrument, but denies that defendant knew she was signing a contract for the sale of land and to pay a commission. The evidence was admissible as tending to show that she executed the instrument with knowledge of its contents. The introduction of evidence did not follow the logical order, but this was not prejudicial, and does not seem to have been complained of at the trial.

The trial court instructed the jury, in substance, that the oral evidence was admitted only for its bearing upon the question of a consideration for the alleged written contract; that such a contract is unenforceable unless re-

duced to writing, but that a verbal contract of this nature is not contrary to public policy, and the parties may carry it out if they wish, and in case it is reduced to writing before suit is brought the object of the statute is fulfilled, and the written contract becomes admissible in evidence and may be enforced in a proper proceeding. This states the law correctly. *Sheehy v. Fulton,* 38 Neb. 691. We have said that the act of 1897 which requires a contract of this nature to be in writing is virtually an extension and enlargement of the statute of frauds, and that its object is to prevent an obligation or liability from being imposed upon a defendant by false testimony. *Baker v. Gillan,* 68 Neb. 368; *Covey v. Henry,* 71 Neb. 118. We have also held that where a defendant, after receiving the benefit of such services, executes a written promissory note in payment thereof, the reason of the law is fulfilled, because his contract is established by his own signature. *Mohr v. Rickgauer,* 82 Neb. 398. And so in this case, unless the defendant had signed the written instrument, plaintiff would not have been in possession of legal evidence with which to prove the existence of the contract; but, having furnished by her own act the legal evidence necessary, she placed plaintiff in a position to enforce the remedy.

On the whole case, we are satisfied that the contract was sufficiently proved by the written instrument, and that the defendant would not have signed the same if she or her attorney had not been advised of the contents of the paper. We have found no error to the prejudice of defendant either in the reception of evidence or in the instructions to the jury.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JANE M. FLOOD, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 3, 1915. No. 18046.

1. **Instructions set forth in the opinion, when considered in connection with the testimony, *held* respectively properly given or refused.**
2. **Carriers: INJURY TO PASSENGER: DAMAGES: REVIEW. Where, in answering a question as to her loss of earnings, the plaintiff probably misunderstood its purport and may have included some of the profits from her investment in the sum she stated, while an objection and a motion to strike the answer should have been sustained, the judgment will not be reversed upon that ground alone; the verdict, as reduced by the district court, not being in excess of what would be a fair compensation for the injuries the plaintiff sustained, and the defendant not having attempted to elicit the actual facts by cross-examination.**

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

John L. Webster and *W. J. Connell,* for appellant.

Brome & Brome and *Fisher & Rooney, contra.*

LETTON, J.

Action for damages resulting from personal injuries. Plaintiff recovered, and defendant appeals.

The petition charges that the plaintiff was a passenger on one of defendant's street cars in Council Bluffs, Iowa; that the car stopped at Hafer's stopping place for the purpose of allowing passengers to alight; that the plaintiff attempted to alight, and, when in the act of stepping to the street, the defendant's employees in charge of the car carelessly and negligently started the car forward, and negligently failed to warn or advise her; and that by the sudden start she was thrown violently to the street and injured. The answer pleads that the defendant stepped off while the car was slowing up in order to stop, while running at a rate of speed not to exceed four miles an hour; that the

employees were without warning that the plaintiff was about to alight; and that whatever injuries she sustained were due to her own negligence in stepping off a moving car.

The plaintiff is a single woman engaged in the furniture business at Battle Creek, Nebraska. She was accompanying her brother, who was taking his little girl to a hospital in Council Bluffs. The evidence on behalf of plaintiff tended to prove that she was unfamiliar with the locality; that the car stopped about 75 or 80 feet west of the usual stopping place, which was not at a street intersection, but at a point known as Hafer's stopping place; that a man left his seat, went forward, and alighted from the car; that the plaintiff followed him, and, when in the act of stepping down, the car was suddenly started, and she was thrown to the pavement and suffered the injuries complained of; and that car then moved a little more than its own length forward and stopped at the usual place.

The testimony for defendant was substantially to the effect that the car only made one stop, which was at the usual stopping place, and that as it was slowing down the plaintiff arose from her seat, walked to the front end of the car, and stepped off while it was in motion.

It is first assigned that the court erred in refusing to give defendant's request No. 6: "You are instructed that the only actionable negligence alleged in the petition in this case is that the car upon which plaintiff was a passenger, having stopped at Hafer's stopping place while plaintiff was in the act of alighting therefrom, was started forward suddenly, and threw plaintiff to the pavement, causing the injuries complained of. You are further instructed that you would not have the right in this case to declare or determine that the defendant was guilty of negligence in any other respect." The court by instruction No. 2 told the jury: "Before the plaintiff would be entitled to recover against the defendant, she must establish by a preponderance of the evidence that, while she was in the act of alighting from the car, it then standing still, the car was suddenly started forward, proximately being the

cause of her being thrown to the pavement. Should she establish such fact by preponderance of the evidence, you will find for plaintiff. But should she fail to establish such fact, to such degree, then you will find against her."

This instruction correctly stated the principal issue in the case. But it is argued that, since the petition alleged that the accident happened "at Hafer's stopping place," the plaintiff would not be entitled to recover unless she proved that defendant stopped the car at that spot, and started it then and there. Defendant suffered no prejudice by the omission to mention the precise point at which the accident happened. Where the plaintiff fell was only a short distance—not much more than a car length—from Hafer's stopping place. The defendant was in nowise misled by the testimony. Neither was there a fatal variance between the pleadings and the evidence, as defendant urges. Rev. St. 1913, secs. 7706, 7713. The argument that, "if the car stops at some place other than the regular stopping place, and for some purpose other than for receiving and discharging passengers, the defendant is not liable, * * * unless the trainmen knew * * * or should have known, that a passenger was in the act of stepping off the car when the car was started," is not persuasive, for the reason that the car was practically at the usual stopping place, another passenger alighted, and the conductor admits that he saw plaintiff leave her seat and walk to the front platform of the car apparently with the intention of alighting.

It is next urged that the court erred in giving to the jury that part of instruction No. 1 reading as follows: "If she started to leave the car while it was standing still, and the defendant's servants, while she was in the act of stepping from the car, started the same, then she is entitled to recover such damages as will work full compensation to her for her injuries."

It is urged that this instruction is inapplicable to the facts, and is an improper statement of the law, because the plaintiff did not leave the car at a regular stopping

place, but stepped or fell off before it reached the regular stopping place. This instruction should be read in connection with No. 2. Since the jury evidently believed the evidence in behalf of plaintiff that the car made a temporary stop just in front of the drug store on account of the track being blocked by other cars ahead of it, and afterwards moved up a short distance to the stopping place, the instruction was properly given. What has already been said as to instruction No. 2 also applies.

It is next urged that the court erred in receiving testimony as to the measure of damages, and in its instruction to the jury on the rule of damages. The testimony shows that plaintiff was taken to the hospital; was in bed there for about two weeks; that her health was good before the accident; that apparently two of her ribs were broken; that she suffered a sever concussion of the brain; that she was in intense pain during the whole time she was in the hospital and for months afterwards, the broken ribs hurting her every time she breathed. She was confined to her bed on account of the injuries after she got home. Her physician testified she suffered from traumatic neurasthenia, is very nervous, and will never fully recover from the injuries. She testifies that she was unable to take care of and manage her business until May, 1912, and that her ability to conduct her business since has been much impaired. Upon being asked what she was able to earn per month or year in the conduct of the furniture business prior to the time she received the injury, she answered, over defendant's objection: "Well, per month I would imagine from $100 to $200. Of course, I hadn't been in it a year, and hadn't made a yearly." Here she was interrupted by defendant's counsel, who moved to strike out the answer for the reasons urged in the objection, among which were that no foundation had been laid; that it was a mere conclusion; that it did not involve the true rule of damages; and was too remote, uncertain, and speculative, and did not state facts. The objection and motion were overruled.

The instruction complained of tells the jury: "Should you find for plaintiff, you will award her such sum of money as will compensate her for her injuries; therein considering the nature and extent of her injuries, and value of time lost by her, and the extent of incapacity, if any, resulting to her, and, if so, its fair value, the amount of pain and suffering endured, and what will compensate her for the same," etc. It is urged that when this instruction was given the jury only had before it speculative, conjectural and incompetent evidence with respect to the value of plaintiff's loss of time and services; that evidence of loss of profits is not proper for the purpose of enhancing damages. The testimony set forth seems to be the only evidence with regard to the value of plaintiff's time. The question did not call for a statement as to profits, but merely as to her earning capacity. The witness evidently misapprehended its purport. Her answer was vague and indefinite, and probably included the element of profits. It should have been stricken. But the defendant made no effort upon cross-examination to ascertain the true facts or to inquire as to what elements entered into this approximation. The question is now presented whether the evidence as to the injuries plaintiff suffered, without taking into consideration the evidence as to her probable earnings in the furniture business, is sufficient to sustain the verdict. It is clear that the plaintiff's time is of some value, and the jury would be justified in considering it worth at least as much as that of an ordinary clerk.

The verdict was for $5,500. At the hearing on the motion for a new trial the court ordered a remittitur of all in excess of $4,000, and entered judgment accordingly. This sum will not do more than fairly compensate the plaintiff for her injuries according to the undisputed testimony as to their severity.

We are of the opinion that the remittitur ordered by the district court operated to remedy the prejudice to defendant, if any, and that a new trial should not be ordered

on account of the reception of the testimony and the giving of the instruction last complained of.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

WILLIAM F. TORBITT, APPELLEE, V. VILLAGE OF BENNETT ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18048.

1. **Easements: STREETS: ADVERSE POSSESSION.** An easement in a city street could be acquired by open, notorious and uninterrupted adverse possession for ten years prior to the enactment of the statute of 1899 (Laws 1899, ch. 79).

2. **Courts: OPINIONS: OVERRULING.** "Before overruling a former decision deliberately made, the court should be convinced, not merely that the case was wrongly decided, but that less injury will result from overruling than from following it." *McEvoy v. City of Sault Ste. Marie*, 136 Mich. 172.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Jesse B. Strode and *G. E. Hager*, for appellants.

T. J. Doyle, contra.

LETTON, J.

Action to enjoin village authorities from tearing down and removing an outside stairway to a building in the village of Bennett. A perpetual injunction was allowed, and the defendants appeal.

Plaintiff is the owner of a two-story frame building in the village of Bennett, which was erected in 1879, and of which he became the owner in 1887. There is an open outside stairway about four feet wide, extending from the sidewalk to the second floor of the building. This stairway

was erected with the building, and furnishes the sole means of access to the second story. The lower end of the stairway rests upon the street close to the building, and occupies a portion of the sidewalk space. In September, 1910, a written notice was served on plaintiff by the village trustees directing him to remove the stairway, and that, unless he did so within ten days, it would be removed by them and the cost of so doing assessed against the property. This action was then begun. There seems to be no dispute about the facts.

The question presented is whether an easement in a city street could be acquired by adverse possession for more than ten years prior to the passage of the act of 1899 (Laws 1899, ch. 79), and we are asked to review and overrule our former decision on this point. This question was first squarely presented in this court in the case of *Meyer v. City of Lincoln,* 33 Neb. 566, where it was held: "When a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for ten years, the title thereto vests absolutely in such occupant." This was followed in *Lewis v. Baker,* 39 Neb. 636, *Webster v. City of Lincoln,* 56 Neb. 502, and *City of Wahoo v. Nethaway,* 73 Neb. 54. The question is also considered in *Krueger v. Jenkins,* 59 Neb. 641.

In the *Wahoo* case, as in this, an earnest attempt was made by counsel to procure a modification of the rule laid down in the former cases, but the court refused to do so, quoting from a Michigan opinion: "Before overruling a former decision deliberately made, the court should be convinced, not merely that the case was wrongly decided, but that less injury will result from overruling than from following it"—saying that further injury, if any, to municipalities had been removed by the act of 1899, and concluding: "Nothing of good could be accomplished by now changing our former rule." *McEvoy v. City of Sault Ste. Marie,* 136 Mich. 172.

Agnew v. City of Pawnee City, 79 Neb. 603, was a case very similar to this, since it involved the right to remove

a stairway in a similar situation. After reviewing former decisions, the court say: "It seems clear from this reasoning, and the cases above cited, not only that title may be acquired by adverse possession in a city street, but that the title in the street is such that it may become servient to an abutting lot by the establishment of an easement therein."

In *Ryan v. City of Lincoln*, 85 Neb. 539, the court was again requested to review and overrule *Meyer v. City of Lincoln*, 33 Neb. 566, and cases following it. It said: "From our standpoint it will not be necessary to consider this branch of the case, and, while we shall not do so, we have no disposition to disparage the opinions referred to."

It may be true, as defendant argues, that the trend of modern opinion is contrary to our decisions, and that the early cases in this state were not well considered (though we do not so concede); but, since the legislature settled the question in 1899, and no possessory right can have been acquired in the streets since 1899 or 1900, it seems clear that greater injustice would result from setting aside our former adjudications than from abiding by them. The rule that adverse possession for ten years before 1899 constituted a perfect title now amounts to a rule of property, and vested rights, such as those in the *Agnew* case, would be interfered with by a change in the law. We are content to let well enough alone and to abide by the established rule.

It is also contended that Torbitt never claimed that portion of the sidewalk space on which the stairway rested. This is based upon testimony that in a conversation between Torbitt and a member of the village board he said he would remove it. There is a direct conflict with respect to this conversation, and there is so much doubt about it that we cannot allow this evidence to weigh against actual possession held for 30 years.

The judgment of the district court is right, and it is

AFFIRMED.

BARNES and FAWCETT, JJ., not sitting.

WILLIS R. WATT, APPELLEE, V. GEORGE D. GOLAY, APPELLANT.

FILED APRIL 3, 1915. No. 18050.

Record examined, and its substance set out in the opinion, *held* free from error.

APPEAL from the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Ralph E. Adams and *J. L. McPheely,* for appellant.

Hague & Anderbery and *F. L. Carrico, contra.*

LETTON, J.

This was an action for money paid to defendant's use. The answer was a general denial. Plaintiff recovered judgment, and defendant appeals.

The evidence for plaintiff seems to establish the following facts: Plaintiff is a dealer in horses in Minden. He is a stockholder and officer in the Denver Horse & Mule Commission Company, a corporation engaged in buying and selling horses and mules in Denver, Colorado. Gordon Hollis is president of that company, and lives in Denver. In 1911 Emery Golay, a young man living in Kearney county, Nebraska, had taken some horses to Denver to sell. While there he exchanged these horses with Hollis for an undivided half interest in an automobile. The young man, with one Oberg, who was with him, believing they had a right to the possession of the machine, started homeward with it. They had reached North Platte when they were arrested upon the charge of larceny of the automobile, preferred by Hollis in Denver. Golay notified his father, the defendant in this case. Golay senior procured the assistance of Mr. Watt, with whom he had been acquainted many years, to secure the release of Emery, and, after some negotiations, Hollis authorized Watt to sell his interest in the automobile to defendant for $750. The fa-

ther did not have the money on hand, and Watt agreed to advance it to Hollis, Golay agreeing to repay it in a few days. The money was paid by proper charge to Watt and credit to Hollis on the books of the corporation. Thenceforward Hollis made no claim to any interest in the automobile, and defendant admits that he paid the garage charges at North Platte, procured the machine there, and ran it home. Defendant refused to pay Watt the money which he had advanced, and this action followed.

For the defense, Mr. Golay testified that he purchased the automobile for $750, on condition that "they would release this suit at North Platte and withdraw the papers from the Governor," but that neither the suit nor the requisition papers were withdrawn at that time, and it was necessary for him and Mr. Watt to go to North Platte and to Lincoln before the matter was settled. He denies that he ever authorized Watt to pay for the one-half interest in the automobile, or that he agreed to pay Watt if he did so.

It is contended that the court erred in excluding a written agreement drawn up at the time plaintiff says the contract was made, signed by Emery Golay, and Hollis, by Willis R. Watt, that, in consideration of the settlement, Hollis would dismiss the prosecution. We cannot see the relevancy of this testimony. The defense is a general denial. Whether a contract was made between Emery Golay and Hollis to dismiss the prosecution could throw no light on the question whether the elder Golay agreed that Watt should pay Hollis for the automobile and that he would pay Watt thereafter, which is the only disputed matter in the case.

It is also objected that the court admitted in evidence a letter to Watt from Hollis. This letter states, among other things: "I have deducted from the amount of your sales the $750 for the automobile, as you requested in your last letter." This tended to prove that Watt had made the payment for the automobile to Hollis, and was properly received. The mere fact that the letter contained reference to other matters is immaterial, and did not prejudice defendant.

We find no error in the instructions, and the evidence is sufficient to sustain the verdict. The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

IN RE NICK ARRIGO.
NICK ARRIGO, APPELLEE, V. GUS A. HYERS, SHERIFF, APPELLANT.

FILED APRIL 3, 1915. No. 18437.

1. **Statutes: DEFINITIONS: LEGISLATIVE POWER.** The legislature may define words used in a statute so that their meaning is extended.
2. **———: ———: CONSTRUCTION.** A legislative definition or an interpretative provision in a statute designed to extend a particular word so as to include more than its usual meaning should be construed reasonably and in accordance with the intent and purpose of the whole act.
3. **Food: PURE FOOD LAW: DEFINITIONS: POLICE POWER.** It is within the police power of the state to provide that certain food products sold in package form shall be deemed "misbranded" if there be contained in the package any gifts, premiums, or prizes.
4. **———: ———: VALIDITY: FEDERAL LAWS.** The fact that congress has declared when a package of food shall be deemed misbranded does not prevent a state from making other requirements not inconsistent with the act of congress respecting the sale of food products in package form.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

Grant G. Martin, Attorney General, Frank E. Edgerton and *J. B. Strode,* for appellant.

T. S. Allen and *E. G. Maggi, contra.*

LETTON, J.

A criminal complaint was filed against the relator, charging that on the 9th day of October, 1913, he unlaw-

fully sold one package of "Souvenir Checkers Popcorn Confection" to one E. L. Redfern, in which package was unlawfully contained a certain gift, premium and prize, to wit: One toy tin butterfly with pin affixed. He was found guilty and required to pay a fine of $10 and costs. Having failed to pay his fine, he was committed to jail until discharged. He brought these proceedings in habeas corpus to obtain his release. A hearing was had, and relator discharged. The state has prosecuted an appeal.

The question presented is whether the relator was guilty of a violation of the pure food act. Rev. St. 1913, ch. 24. He asserts that, since there was no food product in the package but popcorn confection, and this was plainly marked upon the outside thereof, the package was not misbranded, and that subdivision 6, section 2537, Rev. St. 1913, relating to food products in package form, is not within the police power of the state. The state asserts that, since the package sold contained an object in the nature of "a gift, premium or prize," to sell it was a violation of the law. Section 2537 provides that the term "misbranded" shall apply to drugs, liquors and articles of food under certain conditions. It also provides: "For the purpose of this chapter an article shall also be deemed to be misbranded. * * * Sixth. In case of food products if there be contained in the package any gifts, premiums or prizes."

The act in question, while commonly known as the "Pure Food Law," is entitled, "An act to create and maintain a food, drug, dairy and oil commission for the state of Nebraska, to define its powers and duties, to provide for the inspection of foods, drugs, dairy products and oils, to regulate the manufacture and sale of drugs, food products, dairy products, petroleum product and oils," etc. Laws 1913, ch. 109. The general purpose of the act is to protect the public from the adulteration of food products, the unsanitary operation of creameries, dairies, cheese factories, or other places where food products are manufactured or offered for sale, the prevention of fraud upon the public in the sale of food products put up in packages as to

quality and weight, by requiring a correct statement clearly printed on the outside of the main label of the contents, and also of the net weight of the contents exclusive of the container. Many provisions, regulations and restrictions are contained in the act in order to carry out these general purposes. Among these is found the clause upon which this prosecution is based, declaring a package of food products misbranded if there be contained in the package any gifts, premiums or prizes. The evident purpose of the provision as to misbranding is to protect the public by requiring a full disclosure of the contents of each package, and to promote fair and honest competition in the sale of food products by eliminating any act or element designed to conceal the true nature or value of the article packed. These general objects are clearly within the police power of the state. The legislation relates to one of the most essential functions of the government. It treats of the public health, pure foods, and honest weights and measures, which are all matters pertaining to the general welfare and for the protection of the public. For the purpose of enforcing the law, provision is made for a food commission and for inspectors.

The principal arguments of relator are that, unless there is a false statement upon the label, a package is not misbranded, and the legislature has no power to declare it so; "that appellee's business cannot be outlawed because the legislature has defined misbranding to be something that is not misbranding." A number of decisions are cited to the effect that it cannot "make that a party wall which is not a party wall," nor a child born out of lawful wedlock into "a lawfully begotten" one, nor make that a lottery which is not a lottery. We agree in the main with this contention, and also with relator's contention that statutes enacted in the exercise of the police power must have relation to a proper public purpose, and must not arbitrarily invade rights guaranteed by the constitution. Has the legislature power to declare a package so marked "misbranded"? It is an elementary principle of statutory interpretation that, where the legislature expressly states

the meaning which is to be given to a term used in an act, it is the duty of the courts to give it such meaning, and thus carry out the evident intent and purpose of the legislature.

The enforcement of some of the most important provisions of the pure food act depends upon the definition given in the act to many of the words used therein. Unless the words "person," "drug," "adulteration," "misbranded," "blend," and other words therein defined are interpreted to mean that which the legislature declares, the force of the act is practically nullified. Several of these words as used in the act contain ideas not quite within their ordinary meaning. Take the word "drug" as an instance. Many substances may be embraced within the statutory definition which are not ordinarily termed drugs. Also in the statutory definition of "adulteration" a drug is deemed to be adulterated "if its strength or purity fall below the professed standard or quality under which it is sold" (Rev. St. sec. 2536, subd. II), even though no other substances be added to it. Ice cream is deemed "adulterated" if it does not contain at least 14 per cent. butter fat, and fruit cream if it contains less than 12 per cent. butter fat; and yet pure milk varies widely in its content of butter fat, and until this act took effect ice cream in which pure milk and cream were used could not be said to be adulterated merely because its fat content fell below this standard.

The concept which a word conveys is that which custom has accorded it. There is no reason why a legislature may not expand the definition of a word to a reasonable degree and include within the circle of its definition for the purpose of an act, ideas which are related to that concept, but not ordinarily included therein. A definition in a statute is as effective and forceful as any other part of the act. This court has so held in *Herold v. State,* 21 Neb. 50, speaking of a legislative definition of "fraudulent transfer of property:" "This definition is furnished by the act itself, and the definition is as much a part of the act as any other portion. The right of the legislature to prescribe

the legal definitions of its own language must be conceded." *State v. American Surety Co.*, 91 Neb. 22; *Farmers Bank v. Hale*, 59 N. Y. 62. This is the general rule. "Any provision in a statute which declares its meaning or purpose is authoritative. Whether it relates to the object of a whole act, or of a single section or of a word, it is a declaration having the force of law. It is binding on the courts, though otherwise they would have understood the language to mean something different." 2 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 576. See, also, cases cited in note to sec. 358. "The court is sometimes obliged by the legislature to put an interpretation on a word which it does not ordinarily bear when it has been enacted that something *'shall be deemed' to be* something else." *Brooks v. Baker*, 1 K. B. Div. (1906, Eng.) 11, 15; *McElhone v. Philadelphia Quartette Club*, 53 Pa. Sup. Ct. 262; *Commonwealth v. Crowl*, 245 Pa. St. 554; *State v. Standard Oil Co.*, 61 Or. 438; *State v. Harrison*, 116 Ind. 300; *Chicago & E. I. R. Co. v. State*, 153 Ind. 134; *State v. Allison*, 155 Mo. 325; *People v. Henning Co.*, 260 Ill. 554, 49 L. R. A. n. s. 1206, and note; Beal, Cardinal Rules of Legal Interpretation (2d ed.) 301.

The legislature evidently intended to prevent the label upon such a package from doing otherwise than speaking the exact truth. A package may with reason be said to be misbranded if the label does not accurately describe its contents. It is reasonable to presume that it believed it to be a wise provision for the public welfare to enact that packages of food offered for sale should not contain tin butterflies, toy savings banks, or printed coupons offered as prizes. The act contemplates the inspection of dairies, packing houses, and other sources of food supplies, to the end that cleanliness and sanitary conditions shall prevail; but there is no provision for the inspection of places where prizes and gifts are made or handled, however dirty or unsanitary they may be. If this provision is not in effect, these articles, brought from whatever germ-laden source, may be placed in contact with the food. Another evident purpose was the regulation of the weight of the

food contents, so as to prevent fraud, and so that the purchaser should know the quantity of food he was buying. The law requires the weight of the "contents" to be stated on the label. Among the contents in this case was a tin butterfly; in another case it was a toy savings bank. The net weight of the contents is stated, but it is left uncertain how much is food. The weight of the article within the package may be greater than that of the food product. It may be of less value, pound for pound, and thus defraud. The purchaser is left in the dark as to the weight of the food he is buying.

It is also argued that since, under the terms of the statute of the United States, this package is not misbranded, that law controls, and the state act cannot be held to apply. A similar question was raised in *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. Rep. 715, with respect to the statute of Indiana. It was held that the intent to supersede the police power of the state is not to be implied, unless the act of congress, fairly interpreted, is in actual conflict with the law of the state. We find no such conflict here, and both acts may stand and be enforced.

The act is a beneficent one. It is continually exposed to the assaults of those endeavoring to cut down its provisions, and by a process of elimination to fritter away its value to the public. This should not be done, unless the legislature has failed to speak so that, with the aid afforded by its own definitions, its purpose can be understood. It is a sound rule that, where the intent of the legislature and the object and purpose of a law are obvious, and such manifest purpose and intent are not inconsistent with or outside the terms of the law, it is not allowable to permit the intent and purpose to be defeated merely because not defined and declared in the most complete and accurate language. Black, Interpretation of Laws (2d ed.) sec. 151.

We are of opinion the district court erred in discharging the relator, and its judgment is therefore

REVERSED.

BARNES, J., dissents.

IN RE JOSEPH DEKLOTZ.*

JOSEPH DEKLOTZ, APPELLEE, V. GUS A. HYERS, SHERIFF, APPELLANT.

FILED APRIL 3, 1915. No. 18391.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed.*

Grant G. Martin, Attorney General, Frank E. Edgerton and *J. B. Strode,* for appellant.

T. S. Allen and *E. G. Maggi, contra.*

LETTON, J.

The facts in this case are similar to those in *In re Arrigo, ante,* p. 134, except that the package was properly labeled to show it contained cocoa, and on one side in small type the words, "Save the Hamilton Coupon in This Package," were printed on the label. A printed slip or coupon was packed with the food in the can or package, stating that the coupon would be accepted by the Hamilton corporation in exchange for certain goods.

For the reasons set forth in the *Arrigo* case, the judgment of the district court is

REVERSED.

BARNES, J., dissents.

IN RE MIKE INDOVINA.

MIKE INDOVINA, APPELLEE, V. GUS A. HYERS, SHERIFF, APPELLANT.

FILED APRIL 3, 1915. No. 18438.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

*On rehearing, judgment of district court affirmed. See opinion, p. —, *post.*

Grant G. Martin, Attorney General, Frank E. Edgerton and *J. B. Strode,* for appellant.

T. S. Allen and *E. G. Maggi, contra.*

LETTON, J.

The facts in this case are similar to those in *In re Arrigo, ante,* p. 134, except that the package was labeled to show that it contained crackerjack, the net weight was given as 2 ounces, and on one side of the package was printed: "PRIZE. This package contains a pleasing novelty or toy to delight the children, in addition to the famous confection, crackerjack." The package contained a toy bank in addition to the food.

For the reasons set forth in the opinion in that case, the judgment of the district court is

REVERSED.

BARNES, J., dissents.

MCCOOK IRRIGATION & WATER POWER COMPANY, APPELLEE, V. PAULINE BURTLESS ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18965.

1. Waters: IRRIGATION COMPANY: REGULATION OF RATES. An irrigation company is a common carrier of water to a limited degree, and its rates and charges are subject to regulation and control.
2. ———: ———: ———: JURISDICTION: STATE RAILWAY COMMISSION. Jurisdiction to inquire into the reasonableness of water rates and to regulate and fix the same has by the constitution and statutes been conferred upon the state railway commission.
3. ———: ———: ———. Contracts between an irrigation company and water users under its ditch, providing for the use of water and for the maintenance of the ditch, are entered into with the law as to the right of the state to regulate rates forming a part of the contract, and such rates are subject to control.
4. ———: STATE RAILWAY COMMISSION: JURISDICTION. The railway commission is not vested with jurisdiction to settle disputed property rights as to the ownership of an irrigation canal.

APPEAL from the State Railway Commission. *Affirmed.*

W. S. Morlan, for appellants.

C. E. Eldred, contra.

LETTON, J.

A complaint was filed by the McCook Irrigation & Water Power Company before the state railway commission against 18 holders of water-right contracts under its canal, setting forth that the annual maintenance fee due from water-right holders to the company under the contracts was $1 an acre per annum; that complainant has not sufficient income therefrom to enable it to keep up and properly maintain the canal; that an increased charge is necessary and that a charge of $2 an acre would be a reasonable rate, which it is entitled to receive. The prayer is that a hearing may be had and complainant be authorized to charge consumers an annual maintenance fee of $2 an acre, to be made to apply for water furnished for the year 1913.

The respondents filed an answer denying the jurisdiction of the railway commission of the subject-matter of the complaint, which it is said is within the jurisdiction of the courts. The answer also pleads the failure of complainant to furnish sufficient water in the irrigation season of 1913; that it carelessly and negligently allowed the canal to become filled with weeds and debris, and to be obstructed, so that it failed to carry the amount of water to which the respondents' lands were entitled. It also pleads a number of acts of misconduct on the part of certain directors of the corporation whereby it is alleged they obtained special privileges and advantages, and charges general mismanagement.

A hearing was had, and an order made allowing the complainant to increase its maintenance charges to $2 an acre per annum. The company was also required to set apart each year $4,500 for the operation, maintenance and betterment of the ditch and to place any unexpended portion of this amount in a reserve fund for use in emergen-

cies. It was also ordered that a new set of books be opened containing certain specified entries, and that a daily record be kept during the irrigation season of the flow in the main canal and the distribution of water to the users. From this order respondents have appealed.

The principal contention of respondents is that the commission has no authority to make an order releasing complainant from the provisions of the contracts; that the order deprives the defendants of their property without due process of law, and impairs the obligation of their contracts contrary to the provisions of the Constitution of Nebraska, the Constitution of the United States, and of the fourteenth amendment thereof. It is also said that the order is not supported by the evidence, and that under the covenants in the water deeds the title to the canal was and should be in its customers, since the whole amount of available water rights had been sold. These contentions will be considered in different order than presented.

1. The evidence conclusively shows that the rate of $1 an acre per annum is insufficient to maintain the canal, even after deducting certain charges criticised by the respondents, and that unless the complainant is allowed to increase the rate it will be impossible to maintain the canal in a condition so that it will deliver water. The computations made by respondents and set forth in the reply brief, showing that the income is more than sufficient to meet expenses, are not accurate, since they include hundreds of dollars received from the sale of water rights. Such sums are no part of maintenance charges. The plan of the corporation, expressed in its deeds or contracts with holders of water rights, provides that, when the water rights to the capacity of the canal have been sold and paid for, the canal becomes, by certain acts of its officers therein specified, the property of the water-right holders. Under such provision the money paid for a water right represents *pro tanto* a portion of the capital of the corporation. When the rights have all been sold the title to the canal passes, but the title to the money remains in the corporation. It may not therefore be taken from the

corporation without its consent to be used for maintenance. This is said, assuming, of course, that the prices paid have been fair and reasonable and not padded to such an extent that it is seen that at least a portion of the cost of maintenance should be met from the excess charge. In this case, however, no such condition appears as to any of the respondents. Under the order made by the railway commission complainant is not allowed to squander or dissipate any sum realized from the increase in rates in excess of that actually expended each year for the maintenance of the ditch. Its books are subject to inspection, and if it should prove when further repairs have been made to the canal, or a more specific and detailed system of bookkeeping used, that the rate now fixed is excessive, it can be reduced upon proper application being made to that body.

2. It is strongly insisted that the evidence shows that all the available water which could be furnished has been disposed of under existing water-right contracts; that for that reason the consumers own the canal, and the complainant as a stock corporation has no interest in the property. This question involves the ownership of the property, and is one which the railway commission has no jurisdiction to hear or determine. If the facts warrant, proper relief may be afforded by appropriate proceedings in a court of equity.

3. Respondents insist that if the existing rate is unsatisfactory to the company it cannot complain because it was competent, and under no restriction, when it fixed the rate, and that regulation can only apply on the complaint of waters users when they show the agreed rate is unreasonable. This involves the constitutional questions raised.

The crucial question is whether the rate of $1 an acre a year fixed in the contract is a property right with which the state in the exercise of its regulatory power cannot interfere. At the time the canal was built the practice of irrigation in this state was in its infancy, but from the very first the legislature recognized the public interest in the use of water from the streams of the state for irriga-

tion purposes. It placed canal companies in the same class as railways and other common carriers, and it has uniformly been considered that their rates were subject to regulation and control. *Cummings v. Hyatt,* 54 Neb. 35; *Castle Rock Irrigation, Canal & Water Power Co. v. Jurisch,* 67 Neb. 377; *Farmers Canal Co. v. Frank,* 72 Neb. 136; *Fenton v. Tri-State Land Co.,* 89 Neb. 479, 492. At first no tribunal was provided which had the power to fix and establish rates, and the only remedy the consumer had was to apply to the courts to restrain unjust exactions or unreasonable charges, but afterwards by constitutional amendment and statute the state railway commission was vested with full power and authority to regulate and fix rates and charges, so that they would be fair and equitable both to the consumer and to the corporation supplying the water. Const., art. V, sec. 19*a*; Rev. St. 1913, secs. 3382-3384.

The question involved is an important one, and one as to which there has been some difference of opinion; but we believe the larger and broader view, that most consistent with the spirit in which the law of irrigation should be administered, and that to which courts are more and more tending, is that any contracts entered into between the irrigation company and consumers under the ditch, with reference to the annual rates which should be charged for the use of water, were entered into with the law forming a part of the contract, and were subject to legislative control. *Tampa Water Works Co. v. Tampa,* 199 U. S. 241, 26 Sup. Ct. Rep. 23; *Spring Valley Water Works Co., v. Schottler,* 110 U. S. 347, 4 Sup. Ct. Rep. 48; *City of Manitowoc v. Manitowoc & Northern Traction Co.,* 145 Wis. 13; *Stanislaus County v. San Joaquin & King's River Canal & Irrigation Co.,* 192 U. S. 201, 24 Sup. Ct. Rep. 241; *White v. Farmers Highline Canal & Reservoir Co.,* 22 Colo. 191. An interesting discussion of this topic with cases cited may be found in 2 Wiel, Water Rights in the Western States (3d ed.) secs. 1315-1321.

If the canal company cannot receive sufficient money to keep the canal intact, the water supply must fail. The

consumers will be direct sufferers from such a condition of affairs, but the state, which has granted the franchise to cross the lands of others and has allowed the appropriation of public waters for the advancement of agriculture and the building up of prosperous agricultural communities, would also be injuriously affected by the failure of the enterprise. It is also worthy of consideration that, if these contract holders are entitled to be supplied at the rate of $1 an acre, subsequent purchasers of water rights, if any, may be compelled to pay excessive rates in order to provide the necessary funds for maintenance. If the company should attempt to exact such rates, the question might arise whether such discriminatory charges could be upheld.

Osborne v. San Diego Land & Town Co., 178 U. S. 22, 20 Sup. Ct. Rep. 860, was a case brought by an irrigation company to settle the question whether it had authority to increase its water rates. The case was tried in the United States circuit court and appealed to the supreme court of the United States. The contract provided that the annual rate should be fixed by the company "as allowed by law." The company had for many years collected $3.50 an acre, and was now seeking to raise the rate to $7. The defendants claimed that the $3.50 rate had been fixed by contract, under the provisions of a statute which provided that, until the rates "shall have been abrogated by such board of supervisors, as in this act provided, the actual rates established and collected by each of the persons, companies, associations and corporations now furnishing, or that shall hereinafter furnish, appropriated waters for sale, rental or distribution to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legally established rates thereof." The circuit court held that the question whether an increase to the proposed rate of $7 an acre was reasonable was not open to its decision, and that resort must first be had to the board of supervisors of San Diego county, the only body with power to fix rates. The supreme court affirmed this decree. In the opinion, speaking of the claim that the contract rates thus estab-

lished could not be altered at the desire of the company, that they were property rights, and to change them would be violative of constitutional rights, the court said: "The purpose of the act rejects such view. Its purpose is regulation, deliberate and judicial and periodical regulation by a selected tribunal, and we cannot believe that the legislature intends by an absolute and peremptory provision to fix rates upon the water companies unalterable by them, no matter what change in conditions might supervene. Against rates which may become unreasonably high, the statute gives relief to consumers through petition to the board of supervisors. Rates which may become unreasonably low it surely does not intend to impose on the companies forever, except as relief may come from the voluntary justice of its customers or by a violation of the statute and appeal to the courts."

We are aware that there are cases, in which the point was not directly involved, which seem to indicate that if the question were before it the court would have taken a contrary view to that taken here, but there are at least an equal number of cases, better reasoned, as we view the matter, holding practically in conformity herewith.

Holding the view that the contracts were entered into subject to the right of the state in the exercise of its police power to regulate and fix reasonable rates to be charged for the use of the water, the order of the railway commission does not take property without due process of law, and is not in violation of the Constitution of the United States, the fourteenth amendment, or the Constitution of the state of Nebraska.

Many complaints of mismanagement and of undue preferences in the sale of water rights and of other irregularities are made. For these a remedy exists in equity, and the railway commission is not vested with the power to settle and adjust the property rights involved.

The order of the commissioners is reasonable, and is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

MARGARET WELSH, APPELLEE, V. CITY OF SOUTH OMAHA ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18017.

1. **Municipal Corporations: EXCAVATION IN SIDEWALK: INJURY TO PEDESTRIAN: CONTRIBUTORY NEGLIGENCE.** A traveler who knows of a dangerous excavation in a sidewalk is not guilty of contributory negligence, as a matter of law, because, remembering conditions, he attempts in the darkness to pass around such excavation, but, misjudging the distance, falls into it when it is unguarded.
2. ———: **EXCAVATIONS IN STREETS: DUTY TO SAFEGUARD.** A city should exercise ordinary care to protect the public from the dangers incident to grading and paving, and this duty extends to guarding street and alley excavations dangerously near sidewalks or paths to which traffic is diverted by the making of the improvements.
3. **Appeal: VARIANCE.** On appeal a judgment will not be reversed for an immaterial variance between the pleadings and proof.
4. **Trial: REFUSAL OF INSTRUCTIONS.** It is not error to refuse a requested instruction if the legal principle therein announced is correctly stated to the jury in another form.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

H. C. Murphy, W. J. Connell and *W. H. Herdman*, for appellants.

Smyth, Smith & Schall, contra.

ROSE, J.

In South Omaha plaintiff fell into an excavation in a public alley, running north and south midway between and parallel to Twenty-seventh and Twenty-eighth streets, and sprained her ankle. The accident occurred near the south lot line of E street where the alley crosses it at right angles. This is an action to recover damages in the sum of $5,000 for personal injuries resulting from plaintiff's fall. Defendants are the city of South Omaha and Hugh Murphy. The latter was a paving contractor and made

the excavation while performing a contract to pave E street and the alley intersection at or near the place of the injury. The sidewalk across the alley had been removed with a view to lowering the surface of the sidewalk space to grade. The contractor's duties and liabilities were the same as the city's. Plaintiff charged that defendants were negligent in failing to construct barricades, or to give warning of danger, and in allowing the crossing at the alley to remain in an unprotected and unguarded condition. Defendants denied negligence, and pleaded contributory negligence on the part of plaintiff. From a judgment on a verdict in favor of plaintiff for $1,000, defendants have appealed.

The principal argument of defendants is directed to the assignment that the trial court erred in refusing to direct a verdict in their favor. They insist that the testimony of plaintiff shows she was injured through want of care on her part. She lived at the southwest corner of the intersection. The east side of her lot is adjacent to the alley, and her house fronts north on E street. She had opportunity to observe the progress of the work and she knew the conditions as they existed. After the sidewalk had been removed, the alley was graded south from E street to the lot line. The excavation was at least two feet deep, and turned the traffic over adjacent lots, crossing the alley on comparatively level ground and wearing a path around the graded space. There is evidence tending to show that the sidewalk travel had taken this course for a week or more at the time of the accident. During the afternoon of July 10, 1909, plaintiff left her home and followed the path described, walking east on the south side of E street. In returning after dark she attempted to retrace her course around the excavation and, according to her testimony, fell into it. She was not guilty of contributory negligence, as a matter of law, because she attempted to follow the path and thus avoid known danger. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. A traveler who knows of a dangerous excavation in a sidewalk is not guilty of con-

tributory negligence, as a matter of law, because, remembering conditions, he attempts in the darkness to pass around such excavation, but, misjudging the distance, falls into it when it is unguarded. *Orleans Village v. Perry,* 24 Neb. 831; *City of Beatrice v. Reid,* 41 Neb. 214; *City of South Omaha v. Taylor,* 4 Neb. (Unof.) 757; *City of Beatrice v. Forbes,* 74 Neb. 125.

It is further argued that there should have been a peremptory instruction in favor of defendants, because, as they assert, plaintiff, according to her own testimony, fell into the excavation from a private lot. There being proof that the public was not protected by barricades or danger signals, defendants state their position as follows:

"A city owes no duty or obligation, where it has excavated a street or alley to erect barriers or signals for the protection of persons approaching such street or alley from private property, or to prevent such persons from falling from such private property into such street or alley."

For the purpose of the argument, it will be assumed that plaintiff approached the alley from private property. Starting from that premise, did she make a case for the determination of the jury? She testified positively that in the darkness she fell into the excavation. It did not end at a perpendicular wall along the lot line across the alley. From the bottom of the excavation at the south end the ground sloped southward to the original surface of the alley. The dangerous conditions, therefore, did not terminate at the south lot line of E street, but extended farther into the alley adjacent to private property. The sloping area south of the street line was part of the excavation itself. Around it the traffic, by the acts of defendants, was turned from the sidewalk to the path. These facts and conclusions may fairly be inferred from the evidence. Under such circumstances, the duty to protect the public extended to the southern extremity of the excavation. Injury could reasonably have been foreseen. The alley was a public way to which defendants had access. They could have given protection from the alley without trespassing on private property. A city should exercise ordinary care to

protect the public from the dangers incident to grading and paving, and this duty extends to guarding street and alley excavations dangerously near sidewalks or paths to which traffic is diverted by the making of the improvements. *City of Lincoln v. Beckman,* 23 Neb. 677; *City of South Omaha v. Cunningham,* 31 Neb. 316; *City of Lincoln v. Calvert,* 39 Neb. 305; *Manderschid v. City of Dubuque,* 29 Ia. 73; *Alger v. City of Lowell,* 3 Allen (Mass.) 402; *City of Oklahoma City v. Meyers,* 4 Okla. 686; *Niblett v. Nashville,* 12 Heisk. (Tenn.) 684. In the case last cited the court said: "We think the true rule may be stated to be that if an obstruction or excavation be permitted which renders the alley, street, or highway, unsafe or dangerous to persons or vehicles—whether it lie immediately in or on the alley, street, or highway, or so near it as to produce the danger to the passer at any time when he shall properly desire to use such highway—it is such a nuisance as renders the corporation liable. * * * A party bound to keep a highway in repair and open for the passage of the public in a city by night or by day certainly cannot be held to perform that duty by simply keeping the area of the highway free, while along its edge there is a well or excavation uninclosed, into which the passenger, by an inadvertent step or an accidental stumble, might fall at any time. Such an excavation might be all the more dangerous by being immediately on the side of an alley or street rather than in it, as in the latter case it would be notorious as dangerous, and would be shunned by all; while in the former case no such attention might be directed to it, and the unsuspecting passenger, by a mere accidental step, would be liable to be precipitated into it and thus seriously injured."

The issues of negligence and contributory negligence were questions for the jury. It follows that the refusal to give a peremptory instruction in favor of defendants was not erroneous.

Defendants also insist that there is a material variance between the pleadings and the proofs. They argue that proof of plaintiff's having fallen into the alley from pri-

vate property south of the sidewalk space is a variance from the plea that plaintiff was injured through their negligent failure to protect the sidewalk space on the south side of E street. The refinement is too subtle for the practical application of the law. There was only one excavation. It was made by defendants. Their duty to exercise reasonable care to protect the public from the danger thus created was not limited to the sidewalk space. The excavated area south of it was close to the dividing line. Plaintiff was injured in the darkness, and she was unable to point out the exact spot where she fell. Under these circumstances, defendants could not have been misled to their injury. The rule of the statute is:

"No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits." Rev. St. 1913, sec. 7706.

The point is not well taken. *Niblett v. Nashville,* 12 Heisk. (Tenn.) 684; *Rea v. Sioux City,* 127 Ia. 615.

Another assignment of error challenges the trial court's refusal to give a requested instruction that plaintiff is not entitled to recover damages, if proper and sufficient barricades and lights, provided by defendants, had been removed by an unknown person before the accident. Under the evidence defendants were entitled to an instruction on this phase of the defense; but their rights were protected by another direction that defendants would not be liable, if they used ordinary care in placing and maintaining barriers and signals.

If there is no mistake in the views already expressed, there is no prejudicial error in the record.

AFFIRMED.

BARNES and SEDGWICK, JJ., not sitting.

G. A. CRANCER COMPANY, APPELLANT, V. PARIS G. COOPER, APPELLEE.

FILED APRIL 3, 1915. No. 18060.

1. **Sales: CONTRACT: DESCRIPTION OF PROPERTY.** In a contract of conditional sale duly filed of record, a description which will enable a third person, aided by inquiries suggested by the instrument itself, to identify the property is sufficient.
2. ———: ———: **FILING: NOTICE.** The public filing of a contract of conditional sale, in the county wherein the purchaser resides, protects the seller, though the former removes the property to another county.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

E. M. Slattery, Stewart, Williams & Brown and *Field, Ricketts & Ricketts,* for appellant.

Fisher & Rooney and *Earl McDowell, contra.*

ROSE, J.

The action is replevin, and the property in controversy is a piano which had been conditionally sold by plaintiff to Herman Springer under a contract retaining title in the seller until all instalments of the purchase price were paid. A renewal contract containing the same condition and disclosing an unpaid balance of $373.89 was filed February 22, 1910, with the county clerk of Cheyenne county, where the purchaser resided. Thereafter Springer moved to Dawes county, took the piano with him without plaintiff's knowledge or consent, and there sold it to defendant, who claims to be a purchaser for full value without notice of plaintiff's rights. At the close of the testimony the trial court directed a verdict for defendant. Plaintiff has appealed.

The property is a "Henry F. Miller Grand Piano. Style, Lyric. No. 36,571." In the renewal contract filed in Cheyenne county the number was given as "39,371," or

as "39,571." It is argued by defendant that the description containing the erroneous number was insufficient to charge him with notice of plaintiff's title. The rule is: "A description * * * which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property is sufficiently definite." *Farmers & Merchants State Bank v. Sutherlin,* 93 Neb. 707. Though the description is erroneous in part, it suggests inquiries which might have enabled defendant to identify the piano in Springer's possession as the one to which plaintiff had retained title. In that event defendant had constructive notice of plaintiff's rights. *Lamar v. Coleman, Ray & Co.,* 88 Ga. 417; *Harris v. Kennedy,* 48 Wis. 500; *Yant v. Harvey,* 55 Ia. 421. The question was one for the jury. *Iowa Savings Bank v. Dunning & Harston,* 37 Neb. 322; *Livingston & Schaller v. Stevens,* 122 Ia. 62.

The filing of the renewal contract in Cheyenne county was constructive notice of plaintiff's title in Dawes county after Springer moved the piano thereto. *Grand Island Banking Co. v. Frey,* 25 Neb. 66; *Cool v. Roche, Hall & Ray,* 20 Neb. 550.

For these reasons, there was error in directing a verdict in favor of defendant.

REVERSED AND REMANDED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

JAMES E. JUDGE, SR., APPELLEE, V. JAMES E. WALLEN ET AL., APPELLANTS.

RUTH JUDGE, APPELLEE, V. JAMES E. WALLEN ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18061.

1. **Automobile Accident: JOINT LIABILITY.** While two traveling salesmen are engaged in the joint enterprise of transporting themselves by automobile over the territory canvassed by both for different merchants, one of the salesmen owning and operating the auto-

mobile and the other paying sums about equal to the cost of gasoline and oil consumed, the latter, if possessing joint control over the automobile, may be liable for the negligence of the other in operating it; both being occupants at the time.

2. ———: COMMON ENTERPRISE: QUESTION FOR JURY. Whether a person riding in the automobile of another is engaged in a common enterprise with the latter is a question for the jury, where it is an issuable fact in the case.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

T. J. Doyle, for appellants.

Berge & McCarty, contra.

ROSE, J.

James E. Judge, Sr., and two minor daughters, seated in a buggy drawn by a horse, were traveling north on the east side of Eleventh street in the city of Lincoln about 7 o'clock in the evening of August 31, 1911. Between Wood and Washington streets they were struck violently by an automobile which had approached from the rear. James E. Wallen and Benedict E. Binger were occupants of the automobile, and they are the defendants. It is charged in the petition that the automobile was negligently operated, that it was driven at an unlawful rate of speed, about 40 miles an hour, and that the lights were defective. The negligence thus imputed to defendants was denied by them. James E. Judge, Sr., recovered a judgment of $600 for personal injuries and for damages to his horse and buggy. His infant daughter, Ruth Judge, recovered a judgment of $2,000 for personal injuries. The two cases were consolidated for the purposes of trial. Defendants have appealed.

The decisive point arises on a challenge to the jurisdiction of the district court for Lancaster county. Wallen was a resident of Gage county and was therein served with notice of the suit. He was not properly brought into court, unless he and Binger were jointly liable for negligence resulting in the collision. Binger denies responsibility for the accident, and insists that the automobile was

owned and operated by Wallen who had it in his exclusive control. There is convincing proof that the proximate cause of the injuries was negligence in the operation of the automobile. The trial court permitted the jury to find that defendants were jointly liable. Is the ruling correct? There is evidence from which the following facts or conclusions may be inferred: Defendants were traveling salesmen for different wholesale merchants and canvassed practically the same territory. Several weeks before the accident Wallen invited Binger to ride with him over the territory canvassed in common and the invitation was accepted. Binger paid sums about equal to the cost of gasoline and oil consumed, Wallen owning and operating the automobile. Binger shared the seat with him. For their mutual benefit they were engaged in the joint enterprise of transporting themselves over the territory canvassed by both. Binger was not a mere passenger or a gratuitous guest. The facts and conclusions stated may fairly be inferred from the proofs. The dangers and liabilities incident to the joint enterprise, the instinct of self-preservation, the demands of business in canvassing territory for a wholesale merchant, safety and comfort in traveling, the furnishing of gasoline, the joint occupancy of the seat in the conveyance, and the obvious rights growing out of the mutual undertaking may imply that Binger had joint authority to control the means of transportation and the right to demand ordinary care and observance of the law in operating the automobile. As a reasonably prudent person he must have been familiar with the danger of driving a motor car with defective lights at an unlawful speed along a busy street in the dusk of the evening. The circumstances were such that the negligence of one may be imputed to the other. While it was held in *Loso v. Lancaster County,* 77 Neb. 466, that the doctrine of imputed negligence is not in force in this state, "except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like," the law applicable to the exceptions has been stated as follows:

"Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. If, however, two or more persons unite in the joint prosecution of a common purpose, under such circumstances that each has authority, express or implied, to act for all in respect to the conduct or the means or agencies employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all of the others." *Koplitz v. City of St. Paul,* 86 Minn. 373, 58 L. R. A. 74.

To the same effect: *Ward v. Meeds,* 114 Minn. 18; *Beaucage v. Mercer,* 206 Mass. 492; *Adams v. Swift,* 172 Mass. 521; *New York, C. & St. L. R. Co. v. Kistler,* 66 Ohio St. 326; *Christopherson v. Minneapolis, St. P. & S. S. M. R. Co.,* 28 N. Dak. 128; *Schron v. Staten Island Electric R. Co.,* 45 N. Y. Supp. 124; *Nesbit v. Town of Garner,* 75 Ia. 314; *McBride v. Des Moines City R. Co.,* 134 Ia. 398.

Whether defendants were engaged in a joint enterprise was a question for the jury. *Nesbit v. Town of Garner,* 75 Ia. 314; *Ward v. Meeds,* 114 Minn. 18.

In the view thus taken of the evidence and the law applicable thereto, the trial court acquired jurisdiction, and the findings of the jury are justified by the proofs.

The verdicts are assailed as excessive, but sufficient reasons for interference on that ground have not been given.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

DAVID MCCLINTOCK V. STATE OF NEBRASKA.

FILED APRIL 3, 1915. No. 18919.

1. **False Pretenses:** INDICTMENT: SUFFICIENCY. An indictment for obtaining money by false pretenses is not fatally defective merely because the ownership of the money is not alleged in direct terms, if that fact is clearly shown by the indictment as a whole.
2. ———: PLEADING AND PROOF. Under an indictment charging that accused obtained money by falsely pretending that he was the owner of specifically described property, proof that he did not then own such property is essential to a conviction.

ERROR to the district court for Antelope county: ANSON A. WELCH, JUDGE. *Reversed.*

E. D. Kilbourn, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe, and *Lyle E. Jackson, contra.*

ROSE, J.

Defendant was convicted of obtaining money by false pretenses, and for that offense was sentenced to serve in the penitentiary a term of not less than one nor more than five years. As plaintiff in error he presents for review the record of his conviction.

The Royal State Bank gave defendant a credit of $1,498.45, December 8, 1911. The money was paid out on his check December 11, 1911. For the sum named he executed in favor of the bank a note and a chattel mortgage December 18, 1911. In the indictment it is charged that he obtained the money by false pretenses. It is argued that the indictment is fatally defective in failing to charge that the money obtained was the money of the Royal State Bank. After specifically charging false pretenses the indictment proceeds: "Relying upon said false representations of said David McClintock, the said Royal State Bank, by and through said R. L. Drayton, its cashier aforesaid, then and there loaned said David McClintock the sum of

$1,498.45." It is further charged that defendant made the false representations "with intent to cheat and defraud said Royal State Bank." While the ownership is not stated in direct terms, the indictment as a whole shows that the money obtained belonged to the Royal State Bank. Authority is divided, but the modern view, the rule subserving the ends of justice without prejudicing accused, is that the failure to allege in direct terms the name of the owner of the property obtained by false pretenses is not a fatal defect, if the indictment as a whole clearly discloses that fact. *State v. Knowlton,* 11 Wash. 512; *Griggs v. United States,* 158 Fed. 572; *State v. Balliet,* 63 Kan. 707; *People v. Skidmore,* 123 Cal. 267; *State v. Boon,* 49 N. Car. 463. The conviction will not be reversed for informality in the indictment.

Insufficiency of the evidence to sustain the conviction is also urged as a ground for setting aside the judgment. The indictment specifically charges that defendant falsely pretended to be the owner of 64 definitely described steers, and that they were in the possession of Joe Steinker in Antelope county. It is further charged that, relying on both of these false representations, the Royal State Bank loaned defendant $1,498.45. In an instruction the trial court required proof beyond a reasonable doubt that defendant, when he made the representations, was not the owner of the steers. There is no evidence in the record that defendant, when he made the representations, or when he obtained the credit, or when he drew out the money, or when he executed and delivered the note and chattel mortgage, did not own the steers described in the indictment. It is clear, therefore, that the verdict of guilty is not supported by the evidence and that it is contrary to the instruction of the court. For these reasons, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON and FAWCETT, JJ., not sitting.

GEORGE J. FLORY, APPELLEE, V. SUPREME TRIBE OF BEN HUR, APPELLANT.

FILED APRIL 3, 1915. No. 18022.

Contracts: CONSTRUCTION. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

E. J. Clements, for appellant.

T. J. Doyle, contra.

FAWCETT, J.

From a judgment of the district court for Lancaster county, upon a certificate of membership issued by defendant to plaintiff's wife, defendant appeals.

The petition is in the usual form. That Mrs. Flory was a member in good standing at the time of her death, and that plaintiff was the beneficiary named in her certificate, is not controverted. The defense is predicated upon the allegation that the certificate of membership issued to Mrs. Flory was based upon a written application duly signed and delivered by her to defendant; that the application is, by the terms of the certificate of membership, expressly made a part of the contract of insurance, and that it contains the following provision: "I hereby waive all right for myself and all beneficiaries who claim indemnity from this order on account of disability or death occurring to me as a result of abortion or attempt to produce abortion." The allegation in the answer is that Mrs. Flory's death "occurred to her as a result of abortion and an attempt to produce abortion." The reply is a general denial.

The evidence entirely fails to show any attempt on the part of Mrs. Flory to produce an abortion upon herself. On the contrary, it leaves scarcely any room for doubt that the death of the fetus, which caused her death, was the result of an assault made upon her by her brother-in-law about two weeks prior to the date of her death. The district court correctly construed the waiver, above set out, to mean that the act must be done intentionally and unnecessarily, for the purpose of procuring an abortion, and so instructed the jury. That Mrs. Flory so understood the words when she signed the application, and that defendant had no just reason to believe that she would otherwise understand them, is the only reasonable construction that can be put upon the words used. It would be doing violence to every settled rule of construction to hold that she understood the words used in any other sense than that in which they are ordinarily used and understood. As ordinarily used among laymen and among married women, miscarriage is understood to mean failure on the part of a woman, from causes beyond her control, to carry a fetus to maturity; while abortion is understood to mean the intentional causing of a miscarriage. We think it is clear that section 7909, Rev. St. 1913, applies, viz.: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." See, also, *Harbach v. Miller*, 14 Neb. 9, where *Gunnison v. Bancroft*, 11 Vt. 490, is quoted from with approval.

The case is too plain to require further discussion. The trial court properly construed the contract between the parties, and its judgment is.

AFFIRMED.

BARNES and ROSE, JJ., not sitting.

STATE OF NEBRASKA, APPELLEE, V. THOMAS MULLALLY ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18065.

Judgment: REDUCTION: FORFEITED RECOGNIZANCE. The action of the trial court in reducing a judgment rendered upon a forfeited recognizance, where the accused has subsequently been arrested and surrendered to the proper court for trial, will not be disturbed unless an abuse of discretion is clearly shown. Rev. St. 1913, secs. 9017, 9018.

Appeal from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John Everson, for appellants.

O. E. Shelburn, contra.

FAWCETT, J.

One Neff was arrested and informed against on the charge of grand larceny committed in Harlan county. November 15, 1910, he made application for continuance to the next term of court, which was granted. Defendants entered into a recognizance in the sum of $1,000 for Neff's appearance on the first day of the next term of court, which convened on March 2, 1911. Neff failing to appear at that time, the recognizance was on the next day declared forfeited. On the 20th of the same month action was instituted in the district court for Harlan county against the defendants as sureties for the penalty of the bond. A year later that action came on for hearing, and, after evidence taken, judgment was rendered against the defendants for $1,000 and costs. On the 23d of September following defendants filed in the district court an application to be relieved from the judgment, for the reason that after the rendition of the judgment they had captured the accused in Arizona and surrendered him to the sheriff of Harlan county, at an expense to them of about $300, and that the accused had pleaded guilty to the charge against him, and

is now confined in the penitentiary under sentence of from one to seven years. The journal entry of the judgment recites: That the cause came on to be heard upon the motion of the defendants to have the judgment, entered against them on the forfeited recognizance, remitted and set aside; that the state appeared by the county attorney and the defendants by their attorney; that, "upon consideration of said motion and of the showing made by the defendants in support thereof and by the plaintiff in opposition thereto, the court finds that after the rendition of said judgment, Albert Neff, the principal in the recognizance upon which said judgment is based, was arrested and brought to trial; the court further finds that, by reason of the failure of said Neff to appear in accordance with the condition of his recognizance, the state and county were put to an expense of $250, and that said amount should be paid by the defendants herein, as sureties, on said recognizance, and the court finds that the judgment heretofore rendered against the defendants herein on said recognizance should be reduced to $250." Judgment was rendered accordingly, and defendants have appealed.

There is no bill of exceptions in the record. Counsel for defendants in his brief says: "There was no testimony given by either side, though the journal entry apparently might lead the court to infer that there was. The facts were all within the personal knowledge of the court." Counsel for the state in his brief says that the matter came on for hearing before the court upon the application of defendants to have the judgment remitted, "and on this application witnesses were sworn and testified, and evidence was introduced." The judgment against the sureties was entered under the provisions of section 9017, Rev. St. 1913, which provides: "The court in which the action for the penalty of any forfeited recognizance is brought may remit or reduce any part of (or) the whole of such penalty, and may render judgment thereon according to the circumstances of the case and the situation of the party, and upon such terms and conditions as to such court shall seem just and reasonable." The subsequent application

by the defendants to have the judgment remitted is based on section 9018, which provides: "Whenever any judgment shall have been rendered against the defendants for the whole or any part of the penalty of a forfeited recognizance, as aforesaid, the court rendering said judgment shall have power to remit or reduce the amount thereof, when it shall be made to appear that after the rendition thereof the accused had been arrested and surrendered to the proper court, to be tried on such charge." It will be seen that these two sections of the statute vests a large discretion in the court, and action taken by the court in cases arising under them should not be disturbed unless a clear abuse of the discretion thus vested has been shown. The record before us does not show any abuse of discretion. The recital by the court in its journal entry, that its findings are based upon a consideration of the motion "and of the showing made by the defendants in support thereof and by the plaintiff in opposition thereto" must, in the absence of a bill of exceptions, be treated as a verity and as meaning just what it says. The term "showing," as used in the journal entry, clearly indicates that each of the parties had, respectively, supported and resisted the motion by oral testimony, affidavits or documentary evidence, which in either case could only be preserved by a bill of exceptions.

AFFIRMED.

JOSEPH KITTO V. STATE OF NEBRASKA.

FILED APRIL 3, 1915. No. 18883.

1. **Indians: CITIZENSHIP.** By the provisions of the act of congress approved February 8, 1887 (24 U. S. St. at Large, ch. 119, pp. 388, 390), all Indians born within the territorial limits of the United States, to whom allotments of land in severalty have been made under the provisions of said act, or other law or treaty, and all Indians, born as aforesaid, who have voluntarily taken up their residence in the United States separate and apart from any tribe of Indians therein, and adopted the habits of civilized life, are

made citizens of the United States, and such Indians residing in this state are citizens thereof.

2. ———: OFFENSES: JURISDICTION. As to such Indians, congress, by an act approved March 3, 1885 (23 U. S. St. at Large, ch. 341, p. 385), has expressly reserved to the federal courts jurisdiction over certain offenses specially enumerated in section 9 of such act, committed against the person or property of another Indian or other person within the boundaries of any state and within the limits of any Indian reservation. *Held*, that all crimes and misdemeanors not so expressly reserved, or not subsequently reserved by act of congress, are within the jurisdiction of the state courts of the state in which such allottee Indians may reside, as provided in the acts of congress approved March 3, 1863 (12 U. S. St. at Large, ch. 119, p. 819), and February 8, 1887, *supra*.

3. ———: ———: ———. The crime of assault by defendant, an allottee Indian, upon another allottee Indian in this state, and within the limits of an Indian reservation, not being one reserved by any act of congress to the jurisdiction of the federal courts, is within the jurisdiction of the courts of this state.

ERROR to the district court for Knox county: ANSON A. WELCH, JUDGE. *Affirmed.*

W .A. Meserve, for plaintiff in error.

Willis E. Reed, Attorney General, and *George W. Ayres, contra.*

FAWCETT, J.

Plaintiff in error, who was defendant in the court below and will be designated as such herein, is a Santee Sioux Indian. He is an allottee of land in Knox county, under the provisions of the act of congress of March 3, 1863, (12 U. S. St. at Large, ch. 119, p. 819), and of the act of congress of July 1, 1898 (30 U. S. St. at Large, ch. 545, p. 583). He became a citizen of the United States under section 6 of the act of congress of February 8, 1887 (24 U. S. St. at Large, ch. 119, pp. 388, 390). He was charged in the district court for Knox county with an assault upon one John Henry, who is also a Santee Sioux Indian and a like allottee. The assault was committed upon the allotment of one Simon Kitto, also a Santee Sioux Indian, who received his allotment under and by virtue of article

VI of the treaty proclaimed February 24, 1869 (15 U. S. St. at Large, p. 635), and the act of congress of March 1, 1883 (22 U. S. St. at Large, ch. 61, p. 444). It appears, therefore, that the assault was committed by one Indian upon another on land of an allottee and within the limits of a reservation. Defendant filed a plea in abatement, praying judgment, that the information be quashed for the reason that the court is wholly lacking in jurisdiction to determine the information or to hold the defendant for trial thereon or to impose any sentence, should he be found guilty, for the reason that defendant now is, and was at the time of committing said offense, an Indian belonging to the Santee Sioux tribe of Indians, and for over ten years last past has been a Santee Sioux Indian allottee, holding and owning "upon" a conditional patent of allotment from the United States (certain land described), which allotment was made to defendant under the act of March 3, 1863, *supra,* and the act of congress of July 1, 1898, *supra;* that the said John Henry, on whom the assault was alleged to have been committed, was on the date of the alleged assault, now is, and always has been a Santee Sioux Indian of the Santee Sioux tribe of Indians, and was at the time of the assault an Indian allottee, owning 80 acres of land under a patent of allotment from the United States under the same laws as above set out; that the alleged assault was committed upon certain land described, which land was at said time, and now is, and for over 20 years has been the allotment of Simon Kitto, who for over 30 years has been a member of the Santee Sioux tribe of Indians, under article VI of the treaty of the United States and the Santee Sioux Indians, proclaimed February 24, 1869, *supra,* and the act of congress of March 1, 1883, *supra,* which said land now is, was on the date of the alleged assault, and for the last 20 years has been a reservation of the United States of and belonging to the said Simon Kitto, a Santee Sioux Indian, and is not within the criminal jurisdiction of the courts of this state. To this plea the state interposed a demurrer on the ground that it does not state facts sufficient to quash the informa-

tion or to state any defense thereto. Thereupon the defendant demurred to the information, the ground of the demurrer being that the information does not state facts sufficient to constitute an offense punishable by the laws of the state because the information on its face shows that the state court has no jurisdiction over the person of defendant, "or to hold, try, sentence or punish him under said information," and that the information on its face shows that whatever crime was committed "was an offense within the exclusive jurisdiction of the courts of the United States, and not within the jurisdiction of this court." There was also a motion in arrest of judgment, covering substantially the same grounds as the plea in abatement and demurrer. The district court sustained the demurrer to the plea in abatement, and, defendant not electing to plead further, the plea was dismissed. The court overruled both the demurrer to the information and the motion in arrest of judgment. Defendant was arraigned, pleaded guilty, and was sentenced to pay a fine of $50 and costs of prosecution and stand committed to the county jail until the fine and costs were paid. From this judgment defendant appeals.

The question to be determined is one of jurisdiction. Can a Santee Sioux Indian, who is an allottee of land from the United States government, be punished in the state courts for an assault, of the character that makes it a misdemeanor, upon another Indian, who is also an allottee, within the limits of a reservation? In our judgment, the district court properly answered the question in the affirmative. This holding does not in any manner impinge upon the right of the United States government to make rules and regulations in the interest of the Indians; nor do we desire to be understood as holding that, by reason of the fact that, by its several acts providing for allotment of lands to the various tribes of Indians and conferring upon them the right of citizenship, congress has relinquished its right, so long as the government holds the title to the lands allotted to the Indians in trust for them, to place limitations upon the control of the Indians over such al-

lotments or to prescribe the extent to which such allottees (who until the final patents are issued are still wards of the government) may be subject to the laws, either civil or criminal, of the state in which the lands allotted to them are situate. That the United States government has full and absolute control of its territories, reservations and Indian wards cannot be questioned. If, therefore, the offense with which the defendant stands charged is one which congress has reserved to the United States government the right to punish, and the jurisdiction over which it has reserved to the federal courts, then the district court was without jurisdiction. Otherwise its jurisdiction must be upheld.

The act of congress approved March 3, 1863, *supra*, authorized and directed the president to assign and set apart for the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux Indians unoccupied lands outside of the limits of any state, sufficient in extent to enable him to assign to each member of said bands, who was willing to adopt the pursuit of agriculture, 80 acres "of good agricultural land." In section 5 of the act (p. 820), it is provided: "Said Indians shall be subject to the laws of the United States, and to the criminal laws of the state or territory in which they may happen to reside."

The act of July 1, 1898, *supra*, which was an act referring to various tribes of Indians, provides: "That the Secretary shall cause patents to issue to the Santee Sioux Indians who were assigned lands in the state of Nebraska under the act approved March third, eighteen hundred and sixty-three, entitled 'An act for the removal of the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux or Dakota Indians, and for the disposition of their lands in Minnesota and Dakota,' which assignments were approved by the President May eleventh, eighteen hundred and eighty-five. Said patent shall be of the form and legal effect prescribed by the fifth section of the act approved February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reserva-

tions, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes.' "

The act of February 8, 1887, *supra,* referred to in the act of July 1, 1898, in section 6 provides: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The act of March 1, 1883, *supra,* provides that the patents issued to the allottees should be of the legal effect and should declare that the United States holds the allotted lands for the period of 25 years in trust for the sole use and benefit of the Indian to whom such allotment should be made, or in case of his decease, for the benefit of his heirs, "according to the laws of the state or territory where such land is located," and that at the expiration of that period the United States would convey the land by patent to such Indian or his heirs in fee discharged of the trust and free of all charge or incumbrance whatsoever, and that no contract by any such Indian creating

any charge or incumbrance on the lands so allotted or liability of such land for payment thereof should be valid.

The act of March 3, 1885 (23 U. S. St. at Large, ch. 341, sec. 9, p. 385), provides: "That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

Our attention has not been called to, nor have we by an independent examination been able to find, any act of congress or rule or regulation of the interior department, which reserves to the federal courts either the exclusive or concurrent jurisdiction over crimes or misdemeanors, other than the specific crimes above named, when committed by an Indian allottee within the boundaries of a state, whether committed within or without the limits of a reservation in such state, except the act of January 30, 1897 (29 U. S. St. at Large, ch. 109, p. 506), considered in *Matter of Heff*, 197 U. S. 488, and *Hallowell v. United States*, 221 U. S. 317. This act was one to regulate the introduction of liquor into lands of allottee Indians. Under somewhat different facts one case denied the jurisdiction of the federal

courts and the other sustained it. Both opinions show that the controlling question was the best interests of the Indians as "a dependable people." As said by Mr. Justice Day, in the *Hallowell* case: "It is a result of the recently decided cases in this court (citing four cases) that the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependable people." See page 324 for the entire paragraph containing this quotation. It seems to us that if any meaning whatever is to be given to section 5 of the act of March 3, 1863, that "said Indians shall be subject to the laws of the United States, and to the criminal laws of the state or territory in which they may happen to reside," and to the language of section 6 of the act of February 8, 1887, that "upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law," the conclusion we have reached must be right. The defendant and other allottees of his tribe within the state of Nebraska are given the full protection of its laws. They are citizens of the state. They are electors. They are entitled to hold office. They are competent to serve on juries, thereby participating in the enforcement of the laws, both civil and criminal, of the state. They have accepted allotments of land and with it citizenship. They have adopted the habits of civilized life. They are residing upon their allotments, to all intents and purposes separate and apart from any tribe. They are no longer bound by the laws or customs of their tribe. Congress has not reserved to the federal courts the jurisdiction to punish for misdemeanors. If such jurisdiction is not vested in the state courts, it is not vested anywhere, and the perpetrators of misdemeanors of all kinds on an Indian reservation may go, unpunished. Such

clearly, was not the intention of congress. It is not to be found within any of its enactments. It is against public policy, and contrary to the laws of this state, which extend to all, both Indians and white men, within or without the limits of a reservation, the equal protection of the law. *United States v. Celestine,* 215 U. S. 278; *United States v. Sutton,* 215 U. S. 291; *Tiger v. Western Investment Co.,* 221 U. S. 286; and *Hallowell v. United States, supra,* are relied upon by defendant to sustain his contention. The state cites, *contra, United States v. Kiya,* 126 Fed. 879, and *Matter of Heff, supra.* We think an examination of these cases cited on both sides will show that they in no manner conflict with our holding herein. In support of the views herein expressed, we cite *State v. Norris,* 37 Neb. 299, *In re Now-ge-zhuck,* 69 Kan. 410, and *State v. Denoyer,* 6 N. Dak. 586.

A consideration of the various acts of congress in relation to the wards of the government, and of the various decisions of the supreme court of the United States construing them, is interesting, and much space might be used in discussing the same. The writer has read them with keen interest, but is unable to see where any benefit would accrue to the profession by further extending this opinion.

AFFIRMED.

BARNES and SEDGWICK, JJ., not sitting.

JOSEPH A. RANKIN, APPELLEE, V. NORTHERN ASSURANCE COMPANY, APPELLANT.

FILED APRIL 3, 1915. No. 18036.

1. **Evidence: REFUSAL TO PRODUCE WRITINGS: INSTRUCTIONS.** When the plaintiff in an action has complied with section 7960, Rev. St. 1913, and the other party refuses to produce the instrument called for when so ordered by the court, it is the duty of the court to "direct the jury to presume it to be such as the party (desiring it as evidence) by affidavit alleges it to be."

2. ———: ———: ———: INDORSEMENTS: COMPETENCY. This section also applies to indorsements on the writing called for. The question as to the competency of such indorsements in evidence would be the same as if the writing itself had been produced in evidence.

3. ———: PAROL EVIDENCE: RECEIPT. When a receipt given for payment of premium for insurance fails to state upon which of two pending applications the payment is made, parol evidence is competent upon that question.

4. **Insurance**: CONTRACTS OF LOCAL AGENTS. The contracts of a local agent of an insurance company are binding upon the company if within the apparent authority of the agent and are entered into in good faith by the insured.

5. ———: LOCAL AGENT: COLLECTION OF PREMIUMS. If such agent has authority to collect the first year's premium and accepts payment of the same partly in cash and partly by note on short time, and no objection is made on that ground when known by the company, such payment will be binding upon the company.

6. **Trial**: INSTRUCTIONS. No reversible error is found in instructions complained of, nor in the refusal of requested instructions.

7. **Insurance**: CONTRACT. A contract of insurance "may be in writing or may be verbal, or partly in writing and partly oral."

8. **Trial**: ARGUMENT. Mere statements of opinion or conclusions in argument of counsel, even though in themselves objectionable, will not require a reversal, unless it appears that the jury might have been misled or prejudiced thereby.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Will H. Thompson and *Fred H. Aldrich*, for appellant.

G. W. Shields & Sons, contra.

SEDGWICK, J.

The plaintiff in his amended petition alleges that the defendant is an insurance company doing a general life insurance business, and that on the 1st day of June, 1910, the defendant entered into a contract, partly verbal and partly in writing, with the plaintiff's wife, Mabel Rankin, whereby the defendant insured the life of Mabel Rankin in the sum of $1,000, payable to the plaintiff upon the death of Mabel Rankin. A copy of the alleged written portion of

the contract is attached to the amended petition. It is further alleged in the amended petition that Mabel Rankin departed this life on the 24th day of June, 1910; that the defendant was duly notified thereof and payment demanded, which was refused. The defendant admitted that a written application was made to the defendant for insurance upon the life of Mabel Rankin, which was signed by her, and that a payment of $5 was made to the agent taking application, and that it was agreed that a written policy of insurance would upon the payment of the remainder of the premium be issued "if the said application should be accepted by the said company." The answer further alleged that the application contained a provision that there should be no contract of insurance and no policy should be in effect until the first premium should be paid by the said Mabel Rankin during her lifetime and while she was in good health, and that said premium had not been paid, and denied that there was any verbal contract or any other contract than as admitted in the answer. There was a verdict and judgment in favor of the plaintiff, and the defendant has appealed.

The principal issue presented by the pleadings was as to the contents and proper construction of the application for insurance. After the action was begun, and before the amendment of pleadings, the plaintiff demanded of the defendant an inspection and copy, or opportunity to obtain a copy, of the application. The defendant offered to allow an inspection of the application at its office in Detroit, Michigan, but refused to present the application for inspection at the office of the plaintiff's attorney, and afterwards failed to bring the same into court. The court, upon motion of plaintiff, ordered the defendant "to produce said written application for inspection." The plaintiff offered in evidence his affidavit alleging the contents of the application and the indorsements thereon. The defendant objecting thereto, the plaintiff's attorney, having been sworn as a witness, testified that when the order to produce the application was made by the judge then presiding, attorneys for both parties being present in open court, the de-

fendant's attorney said that "no matter what the consequence might be he would refuse to produce that document." The defendant's motion to strike out this evidence was overruled. This ruling was clearly right. The order to produce the document had not been complied with, and this evidence showed conclusively that the refusal was wilful and without justification, and such refusal required the court to "direct the jury to presume it to be such as the party (desiring it as evidence) by affidavit alleges it to be." Rev. St. 1913, sec. 7960. The plaintiff's affidavit is in the record and must be considered as correctly stating the contents of the application. This, of course, also applies to the indorsements on the application. Such indorsements must be considered to be as alleged in the affidavit. The question as to the competency of such indorsements in evidence would be the same as if the application itself had been produced in evidence.

The defendant asked the court to instruct the jury to return a verdict for the defendant, which the court refused. This question is discussed at large in the briefs, and many special assignments of error are predicated upon it.

It appears that two applications were made and were pending together, one upon the life of Mr. Rankin, and one upon the life of his wife, Mabel Rankin. Mr. Rankin paid $5 and gave his note for the remainder of one year's premium on one of these applications. He contends that the payment was made on Mrs. Rankin's application, but the defendant contends that it was upon the application of Mr. Rankin, and that no premium was paid for the insurance here sued for. The receipt in evidence shows that the $5 was paid by Mr. Rankin; but he testifies that it was paid for Mrs. Rankin, and he is well supported in this. He produced another witness who so testified, and also the company's agent himself testified upon cross-examination: "Did you receive any cash upon the policy of insurance—upon the application on the life of Joseph A. Rankin? A. No, sir. Q. Did you receive any cash upon the application of Mrs. Rankin? A. Yes, sir. Q. That is

the only money that you received as a matter of fact? A. Yes, sir." The receipt above referred to and the application of Mrs. Rankin as stated in the plaintiff's affidavit constitute the contract between the parties. The receipt is called by both parties "the binding receipt." It contained the provision: "The assurance will be in force from the date of the medical examination; provided, the risk is accepted by the medical directors of the company * * * provided, a medical examination and complete application is made and submitted to the company at its home office, in Detroit, Michigan, and that the applicant, if he shall not receive his policy within thirty days from the date thereof, shall notify the company." It specified that the agent had authority to collect the first year's premium. The $5 in cash and note on short time were received by him as such payment, and no objection was made by the company on that ground. It was therefore sufficient payment.

The defendant appears to rely upon certain clauses in the rate book of the company and in other documents not called to the attention of the assured. The agent acted within his apparent authority in disregarding such provisions, and the defendant is bound by such acts of its agent.

There was some conflict in the evidence as to the time of the commencement of Mrs. Rankin's fatal illness, and defendant contends that the examining physician was deceived as to her condition. But this and similar questions were for the jury and appear to have been fairly submitted.

The defendant's assignments of error, 3 to 8, inclusive, are upon the refusal of the court to give instructions requested. Some of these requested instructions were substantially given by the court; others relate to the sufficiency of the evidence upon points discussed. We find no reversible error in refusing these requested instructions.

In the condition of this record, there was no reversible error in instructing the jury that a contract of insurance

"may be in writing or may be verbal, or partly in writing and partly oral." The defendant's assignments, 10 to 14, inclusive, complaining of instructions given by the court, relate to matters already sufficiently discussed.

The contract was made with defendant's local agent, and it was immaterial who the general agent of the company might be.

Remarks of plaintiff's counsel in argument are objected to as misconduct; but these remarks were generally expressions of opinion, and we have not observed that the record shows that counsel made such statements of fact as require a reversal.

We have not found any error in the record requiring a reversal, and the judgment of the district court is

AFFIRMED.

BARNES and ROSE, JJ., not sitting.

ROMAN WOJECK, APPELLEE, V. JOHN NICKLES, APPELLANT.

FILED APRIL 3, 1915. No. 18041.

Appeal: COURTS: PRESUMPTION. It is the duty of the trial courts to cause a defendant who appears without counsel to be informed of his rights. In the absence of evidence to the contrary, this court will presume that the trial court has performed that duty.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Wayne E. Sawtell and *Edward Simon,* for appellant.

Arthur C. Pancoast, contra.

SEDGWICK, J.

This action was begun in the district court for Douglas county in May, 1911. It was alleged in the petition that defendant had kept a vicious dog which attacked and injured plaintiff. The defendant appeared by attorneys and

filed a motion to strike out of the petition various matters alleged to be redundant and immaterial. Afterwards, on October 9, 1912, and while the motion was pending, defendant's attorneys withdrew from the case. The court at once overruled the motion, and the defendant was called by telephone. Defendant is a foreign-born citizen, with very imperfect knowledge and use of our language. Upon his appearance in court in obedience to the telephone call, a jury was impaneled, and the plaintiff's attorney announced: "I desire the record to show that we waived peremptory challenges, and Mr. Nickles said he was satisfied with the jury." The defendant replied: "I aint satisfied with the jury. I want to tell the jury what was happening. I want my witnesses here." Why the plaintiff allowed a year and five months to elapse without obtaining a ruling on the motion attacking his petition, or taking any action to advance his case to a hearing, does not appear from the record. On the same day that the motion was passed upon the case was put upon trial; the defendant was called, but he evidently did not know anything about his rights, nor about the procedure in the courts. The court ought, under such circumstances, to carefully instruct him as to the situation, and of the necessity of counsel. The jury returned a verdict in favor of the plaintiff. Judgment was entered thereon, and defendant has appealed.

After the trial and judgment defendant employed counsel, who filed a motion for new trial, but the allegations of the motion were not supported by any evidence. The presumption is so strong that the trial court would perform every duty that we must assume that everything was fully explained to the defendant, and that he desired the case to proceed without any answer on file and without the assistance of counsel. We cannot presume otherwise in the absence of affirmative showing in the record.

The judgment of the district court is therefore

AFFIRMED

BARNES, FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. ANTELOPE COUNTY, APPELLEE, V. JOHN D. MILLER, APPELLANT.

FILED APRIL 3, 1915. No. 18062.

Sheriffs: FEES: REPORTS. A sheriff is required to report all fees earned by him by virtue of his office, which are not especially excepted from his report by statute. His salary is in lieu of fees.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Affirmed.*

O. A. Williams and *Kelsey & Rice,* for appellant.

J. F. Boyd, contra.

SEDGWICK, J.

The respondent, as sheriff of Antelope county, collected fees for his services attending on district court and summoning juries. He neglected to enter these items upon his fee book or report them to the county commissioners. The county brought this action in mandamus in the district court for Antelope county to compel the respondent to report these fees. The district court found the issues in favor of the county and issued the peremptory writ of mandamus as prayed, and the respondent has appealed.

The action was rightly brought in the name of the county. *State v. Kelly,* 30 Neb. 574; *State v. Russell,* 51 Neb. 774.

The respondent filed an answer in which he alleged "that the relator is without capacity to sue in this court." He now insists that the counsel who brought the action was not authorized to bring it. The above allegation was not sufficient to present such question. The presumption is that the counsel was duly authorized by the county, and, as the evidence is not preserved in a bill of exceptions, the presumption would be, if necessary, that there was ample proof of the authority of the attorney who brought this action for the county.

These fees were earned in the performance of his duties as sheriff, and the law of 1907 (Laws 1907, ch. 54) provides that the compensation of the sheriff shall be a salary which is fixed by law and is in full of all services rendered by virtue of his office. In *Red Willow County v. Peterson*, 91 Neb. 750, it was decided that the sheriff was not required to report certain mileage fees which the statute (Laws 1907, ch. 53) expressly provided should not be reported; and in *Dunkel v. Hall County*, 89 Neb. 585, it was held that the sheriff, by virtue of his office, is not required to act as jailor, and that when he employs a jailor the county is liable for the jailor's fees. These two cases, relied upon by the respondent, are not in point in this case, since the statute makes no exception of fees for services of this character.

The judgment of the district court is

AFFIRMED.

FAWCETT and LETTON, JJ., not sitting.

ALDEN A. BARDEN V. STATE OF NEBRASKA.

FILED APRIL 3, 1915. No. 18751.

1. **Judges: ACTING JUDGE: FAILURE TO GIVE BOND: PLEA IN ABATEMENT.** When a county judge is disqualified to act in a case pending before him, and county commissioners appoint a person to act as judge in such case, and by virtue of such appointment he holds a preliminary examination of a person accused of crime, objection to his qualification to so act on the ground that he failed to give the bond required by statute, made for the first time by plea in abatement in the district court, is properly overruled. As against such objection, such acting county judge must be regarded as an officer *de facto*.

2. **Highways: ESTABLISHMENT: OBSTRUCTION: PROOF.** A public highway may be established by dedication and use, or by adverse user for ten years. But when a defendant is prosecuted for obstruction of a highway by encroaching upon the alleged limits of the right of way, but not upon the line of travel, it must be proved

with some degree of certainty that the encroachment complained of is within the limits of the land dedicated, or adversely used.

3. ———: OBSTRUCTION: PROSECUTION. If the county commissioners by regular proceedings establish a public highway with definite location and boundaries, one who wilfully obstructs such road may be prosecuted under the statute for nuisance in obstructing a public highway.

4. ———: LOCATION: CRIMINAL PROCEEDINGS. It is not the policy of our law to determine the locality of public roads, when indefinitely located, by criminal proceedings.

5. ———: OBSTRUCTION: PROSECUTION: LOCATION: PROOF. In a prosecution for obstructing a highway by the adjoining landowner by placing a fence along the side of his land, but which it is alleged is so placed as to encroach upon the highway, the location and boundaries of the highway as extending to and including the locality of such fence must be proved beyond a reasonable doubt.

6. ———: ———: ———: ———: SUFFICIENCY OF EVIDENCE. In such case, if the evidence of the locality and boundaries of the highway is so indefinite and uncertain that it cannot be determined beyond a reasonable doubt that such fence is within the limits of such highway, a conviction cannot be sustained.

7. ———: ———: SUFFICIENCY OF EVIDENCE. The judgment in this case is clearly wrong because the evidence fails to establish the locality and limits of the alleged highway with any certainty, and does not prove that the fence complained of is within the limits of a pubic highway.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed.*

A. L. Tidd and *Livingston & Heinke,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

SEDGWICK, J.

The defendant, who is plaintiff in error here, was found guilty in the district court for Otoe county on the charge of nuisance by obstructing a public highway, and has brought the case to this court by petition in error.

1. The defendant filed a plea in abatement in which he alleged that he had no preliminary hearing on the com-

plaint filed against him in the county court, for the reason that the appointment of W. W. Wilson as special acting county judge of Otoe county, Nebraska, "is void, for the reason that no bond was required of him as required by law, and that he did not qualify as required by law by giving a bond." It is not stated in the brief, and we have not observed, that the record shows that any objection was made to the qualification of this special county judge at the preliminary or until this plea in abatement was filed in the district court. The statute requires such specially appointed officers to give bond, but it is not necessary in this case to determine whether the failure to give such bond would disqualify him to act if timely objection had been made. It seems clear under the authorities that, unless such objection is made before the conclusion of the hearing, the judge so appointed must be regarded as an officer *de facto*. Constantineau, Public Officers and the De-Facto Doctrine, sec. 137; *In re Hewes*, 62 Kan. 288; *Tower v. Whip*, 53 W. Va. 158.

2. There are several assignments of error in the brief, but we find it necessary only to consider one of them. The record shows that in 1871 a petition was filed with the county board of Otoe county asking for the opening of a road on the section line east of the land now owned by the defendant. The county board appointed a commissioner to locate the road. The commissioner reported to the county board that he had surveyed the location of the road, and the field notes of his survey are included in his report. These field notes show a bend in the road surveyed encroaching upon the lands in question then owned by the defendant's grantor. There was no hearing before the county board, no order made opening the road and defining its limits, and, of course, no damages paid the owner of this land. The evidence also shows that the road was thereafter used by the traveling public and has continued to be a much traveled road until the present time. About a year before this prosecution was begun, the defendant built the fence along the east side of his land, and it is charged in the information that this fence infringed

upon the public highway. A bend of a creek extended across the section line, and the commissioner had made the survey around this bend along the plaintiff's land. The defendant contended that he had placed this fence well within his own land so as to leave the whole of the public highway unobstructed, and this is the question of fact upon which his guilt or innocence depends.

It would seem that if the field notes of the commissioner are intelligible, as they are alleged by the prosecution to be, there would have been no difficulty in establishing beyond question how far the road, which was surveyed by the commissioner and adopted by the public, extended from the section line into the defendant's land. The distance from the section line of the fence which the defendant erected could also be established by actual measurement. There was no attempt at definite and exact evidence upon these points. The prosecution would ask a witness whether the defendant's fence infringed upon the road, and when the witness answered that he had been along there some years before, but paid no attention to the matter and could not state how far, he was asked and allowed to give his best judgment. Under such circumstances we have all manner of estimates in regard to the distance.

Mr. Fritz Hillman was a witness for the prosecution. His evidence is perhaps as definite and reliable as any. He had been acquainted with the road for 40 years, and had traveled over it "thousands of times." He testified: "When I first knew it, I didn't know exactly where it was. Afterwards it was farther west, probably six or eight or ten rods, something in that neighborhood, from one back to another. That was prairie at that time, as near as I can recollect. Then the man that owned it broke up that bottom, and he naturally crowded the road back to the creek. Whether he did that or the neighbors, I don't know. Whoever traveled it there at that time crowded the road back to the creek where this little bend comes now. As long as I can recollect, there has been trouble right there. At that time it was sloping down towards the creek. Whoever did it, I don't know; somebody worked it and leveled that off

so that it went slanting pretty close to the edge of the creek. When first I knew it, it was kind of slanting. We always had to watch out or our wagons would slide down into the creek. Q. Now, how has it been as to slant since the road has been worked? A. It is pretty much level. Q. Now, state where the road was from the time you knew it up to the present time with reference to the section line at this bend. A. The section line that runs straight through—why, the edge of the bank, the west edge from the creek bank, was probably eight or ten feet farther west, about two rods that would be in the road, about two rods that left belonging to the road; it was probably eight or ten feet, in my judgment, from the edge of the bank up farther west. * * * Q. State the condition of the road about 30 years ago, and what it was three or four years ago with reference to this bend. A. It was just the same, only it was worked a little—made it a little smoother and leveler. Three or four years ago it was just the same as it was 30 years ago, only in a little better condition. Q. State as to the locations 20 years ago and three or four years ago. A. I said it was about the same. I didn't see any difference; if there was any difference it was very little. I didn't notice it. Q. Now, state if there is any difference in the west bank of this bend; state if there is any difference in the west bank of this bend now and 30 years ago. A. Yes; it had been worked down. Q. Tell the jury the difference in the location. A. There is no difference in the location, only that the bank is worked down, that I know of. Q. State whether or not the edge of the bank along this bend is where it was 30 years ago, or whether it is farther east than it was 30 years ago. A. I think it's practically the same, only it's been worked down now; that's all the difference I could see." On cross-examination he testified: "Q. The road now is on the section line, is it not? A. Well, somebody worked it. The last couple of years they drove through the ditch; they have filled that up now, and it's on the section line now. Q. How long have they been working on it, you say a couple of years on the section line? A. No; I didn't

say that. Q. Well, about how long? A. A week or two ago. Q. They drove through on the section line a couple of years ago? A. Yes, sir. (The remainder of the answer to this question was stricken out.) Q. When was the first time you traveled over this road? A. In the fall of 1873. Q. Was the road on the section line then? A. No, sir; there was no bend there, it was on both ends where the two banks, these two creeks were. Q. But not at the bank? A. Not where that bend was in the road, no. Q. When did that bend get back to the bank? A. Several years afterwards. At that time it was farther west. Q. Farther west than the bank? A. Six or seven rods, something like that. Q. There was no fence there to shut off driving across the prairie? A. Yes, sir. Q. When was it that you drove over and noticed it was slanting the first time? A. I don't recollect just when. Q. How long was it after you were over it the first time, about? A. I drove over that road probably two or three times a week. I don't know just when that was. Q. How much farther west was it at that time than when you first knew the road? A. I don't recollect that exactly. I think from six to eight rods, maybe ten. Q. There is a bridge farther north, is there not, on the section line? A. No. Q. It's east of the section line? A. Yes; I believe it's east. Q. And has been for some time? A. Yes, sir. Q. It's a little hard to locate the section line there exactly? A. No; I don't think so. Q. You don't think so? A. No, sir. Q. Isn't it hard to locate the section line there where the road runs eight or ten rods west of the curve? A. I don't know whether it is or not. Q. As a matter of fact, you don't know of your own knowledge that any part of this road is on the section line? A. No, sir; I never measured it out. Q. So far as it being a section line or not a section line is simply a guess of yours? A. Yes, sir. Q. Now, at the point of this curve, didn't the water, the flood water, wash the dirt away? A. I don't think so, not to amount to anything. Q. Wasn't it that that caused the slant in the road? A. No; the slant in the road was where it was crowded pretty well toward the creek bank, that gradually

pushed the dirt in. Q. When was it first leveled off to your knowledge? A. That I don't know." On redirect examination he testified: "Q. In answer to Mr. Livingston's question, you said that about a year or more than a year ago they drove through this ditch? A. Yes, sir. Q. Explain to the jury why it was necessary to drive through this ditch. A. Well, somebody worked that bank of the curve there in the road—worked it and left it in such poor condition that hardly anybody could drive along there. They took the fence down, I did myself, and drove right straight through." He was asked as to the condition of the road along the section line across the creek, and answered: "I went through them holes there myself. It was a break-neck job. Q. Those that went through had to go through this ditch because of the fence that was there at that time? A. Yes, sir. Q. Now, state whether or not people went through there after this fence was removed, through this ditch? A. They did. I say the bank on the west side was worked, but left in such poor condition that people drove through below. Q. Was that before a year ago? A. Well, before a year ago, I guess."

From this and other similar evidence the jury were asked to find the location of the public highway and determine whether the defendant's fence obstructed the same.

There is also evidence that the creek at this point has continually washed away its banks in the defendant's lands during the 40 or more years since the county board procured their commissioner's field notes as to the location of the road. If this is true, and the place of travel was moved from time to time, still, if the washing was irregular so that the line of travel remained permanently in any one locality for the space of ten years, the public, if their use of the line of travel excluded the defendant's use of the land, might acquire a right of way by prescription. Even under such circumstances a serious question might arise as to how far beyond the line of travel the public right extended. Under the evidence in this case it is impossible to find with any degree of certainty how far this erosion of the banks of the creek extended, or even whether

it extended so far into the defendant's land as to be worthy of consideration in this case. Many witnesses were questioned upon this point, but, generally speaking, they all showed that they had no definite knowledge upon the point, and no measurements were taken. It would be difficult to say whether there is a preponderance of evidence as to any particular locality of the highway, but it is certain that this evidence does not establish beyond a reasonable doubt that the public highway extended beyond, so as to include the line upon which defendant's fence was constructed. The location of this highway is, of course, the basis upon which defendant's guilt is predicated, and he cannot be convicted of crime unless this location of the highway can be proved beyond a reasonable doubt.

Formerly criminal law was used as a method of determining the locality of roads under doubtful circumstances, But that is not the policy of our law. It appears to be conceded that the road extends farther into defendant's land than it did as it was formerly traveled by the public. As to how much farther it extends into defendant's land is, so far as this evidence goes, entirely indefinite. It is manifest from this evidence that the defendant and county authorities disagree in good faith as to where this road actually is. Under such circumstances, if the county authorities had proceeded to establish the road and have its boundaries definitely determined and located and made a matter of public record, and the defendant had thereafter wilfully obstructed the road so established, he might, under our statute, have been prosecuted for nuisance in obstructing a public highway; but there is no evidence in this record from which it might be found, beyond a reasonable doubt, or even with any plausibility, where the limits of this road really are. Under such circumstances, it cannot be said that the defendant has been shown to be guilty of crime beyond a reasonable doubt.

The judgment of the district court is therefore

REVERSED.

MORRISSEY, C. J., not sitting.

HAMER, J., concurring.

I am obliged to vote for the majority opinion, although I regret to do so. The trouble is that it is a criminal case, and, of course, the rule is that the defendant may not be found guilty unless the evidence shows his guilt beyond a reasonable doubt. I do not think any one ought to be allowed to exercise his guess as to where the road is and then be permitted to fence it up. If there is a road there which people travel, then that fact alone ought to be enough to establish the "road" and require its maintenance. It should then be the business of the landowner and everybody else to keep out of the road with any sort of obstruction until there is an adjudication in a civil case to the effect that it is *not the road.* It is a technical rule that permits the defendant to get in and occupy the road and crowd the public out of it and make it dangerous to travel, and yet not be punished for it. I am in favor of the adoption of a rule that, no difference where the boundaries of the road may be actually shown to be by a survey, it is the duty of everybody to keep off the road with any sort of fence or obstruction. I would have every road a "road" as long as it was traveled and until the court in some sort of civil case got in and said that it *really was not a road.* I would make a road "a sacred institution" and have everybody keep hands off of it. As it is presented, this is a criminal case, and the inexorable rule is that in a criminal case, before the defendant can be found guilty, the evidence must show his guilt beyond a reasonable doubt. I do not like to make a criminal case out of it, but it is a criminal case, and there is no help for it. Every road should be a road to *Rome,* and it should be kept open alike to the citizen and the soldier. I would make it sacred.

ROSE, J., dissenting.

Defendant was accused by the state of unlawfully obstructing a highway by means of a fence. The jury found him guilty beyond a reasonable doubt. The conviction should be affirmed. The existence and continuous use of the highway since 1873 is established beyond reasonable

controversy. There is convincing proof that defendant fenced part of the traveled roadway. A credible witness testified that he was familiar with the road. He said that he had worked on it at the place in controversy 20 years ago, had since traveled it, had torn down the fence, and that he thought there was in the meantime little or no difference in the location. Another witness said the road was in the place it occupied in 1879. There is more testimony of like import. The conviction rests on facts established according to the usual methods of making proof in similar cases. In *Daniels v. People,* 21 Ill. *439, there was a dispute whether a road had been located at the point of obstruction or on a line lateral to it. The prosecution was maintained on evidence tending to prove that the road at the place of obstruction had been located and used for the statutory period. In *State v. Davis,* 27 Mo. App. 624, the rule is stated as follows: "In an indictment for unlawfully obstructing a public highway, proof that the part of the road obstructed by defendant had been in use for more than ten years preceding the act of interference, as a public highway, is sufficient to support the indictment without any record proof of the establishment of the road by an order of the county court." There is abundant authority to the same effect. It was unnecessary to inquire into the original proceedings even in a criminal prosecution. *Lydick v. State,* 61 Neb. 309. In condemning the case made by the state, the majority, in my opinion, have departed from recognized rules of law and evidence.

The doctrine of the majority that it is not the policy of the law to determine in criminal proceedings the location of indefinitely located roads is a radical departure from the statutes and from the former decisions of this court. When the legislature speaks by means of a valid enactment, it declares the policy of the law, and in that respect leaves nothing for the determination of the courts. Obstruction of highways is repeatedly denounced by the Criminal Code as unlawful. Violators of the statute "shall be fined in any sum not exceeding five hundred dollars,"

said the lawmakers. Rev. St. 1913, sec. 8845. No distinction or exception is made in regard to "roads when indefinitely located." It is the duty of the courts to enforce the law as written. The state should not be ordered into the civil courts to redress criminal acts, nor should proper rules of evidence be relaxed in criminal prosecutions for obstructing highways.

In my opinion the county attorney, the trial court and the jury performed their duties in this case.

BARNES, J., concurs in this dissent.

E. Z. ALBRIGHT, APPELLEE, V. JOHN SCHWABLAND ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 17930.

Deeds: GENERAL WARRANTY: BREACH. The covenant in a deed of general warranty of title, and for quiet enjoyment, made by one having obtained only a final receiver's receipt for the premises conveyed, is broken when the government reasserts title and cancels the final receiver's receipt, at which time a right of action accrues to the grantee.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. C. Robinson and *B. Ready,* for appellants.

French & Orvis, contra.

HAMER, J.

This is an appeal from the district court for Cedar county. The plaintiff sued John and Ella Schwabland upon a breach of covenants of general warranty and quiet enjoyment in a deed by which they undertook to convey the title to certain real estate to plaintiff and another, who later conveyed to plaintiff. There was a verdict and judgment in the sum of $1,920, with interest at 7 per cent. from June 12, 1909, to March 4, 1912, amounting to $365.86,

making a total of $2,285.86. The evidence shows that the title failed. There was a cancelation of the claims, and the title which was based on final receiver's receipt was reasserted by the United States government.

In *Shattuck v. Lamb,* 65 N. Y. 499, it was held: "Where, at the time of the execution of a deed, the premises are in the possession of a third person holding under paramount title, and the grantee in consequence is defeated in legal proceedings to obtain possession, and is kept out of possession, this is a breach of a covenant of quiet enjoyment contained in the deed, and the grantee may maintain an action thereon."

The following case tends to support the decision in the New York case: *Kramer v. Carter,* 136 Mass. 504. In May, 1909, the United States government re-established its title to the land and conveyed it to others, and at that time the covenants were broken.

When the title failed the plaintiff's action accrued, or at least there was evidence of its existence which could not be successfully controverted. If the claims were canceled in favor of the government, then it should be presumed that the government had the paramount title, and that any time it asserted the same the plaintiff had a right to commence his action, which he did within the time fixed by the statute of limitations. The evidence sustains the verdict. The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and ROSE, JJ., not sitting.

SEDGWICK, J., concurring.

Our statute for some purposes regards a final receiver's receipt of the United States government as conveying title. I understand that in this case when this deed was made, containing the covenant relied upon, all parties knew that the grantor held the final receiver's receipt and had possession of the land. This was the title relied upon by the parties. It was presumed that the patent would follow, as it ordinarily does. The covenant in the deed, then, should

be construed with reference to this condition, and when the government canceled the final receiver's receipt, and the grantor was no longer able to convey title, the covenant was broken within its meaning, as understood by the parties. When a covenant of title is broken the right of action thereon accrues. It is not necessary to cite authorities on that question. I think, therefore, the defense of the statute of limitations in this case fails.

P. J. POSTLE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED APRIL 3, 1915. No. 18555.

1. **Railroads: PRIVATE CROSSING: DUTY TO CONSTRUCT OVERHEAD CROSSING.** Where 27 years have intervened between the date of an agreement made by the owner of land with a railroad company concerning the construction of a private farm crossing, and the railroad company, in compliance with the agreement, has constructed and maintained an adequate grade crossing, there is no obligation upon it to build an overhead crossing merely for the convenience of the landowner, unless changed physical conditions require such overhead crossing.
2. ———: ———: ———. Where, under such circumstances, it is shown that the railroad company is willing to construct the overhead crossing if the complainant will pay the cost of construction and maintenance, there is no sufficient ground of complaint against the railroad company.
3. ———: ———: ———: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* insufficient to sustain the complaint of the landowner against the railroad company.

APPEAL from the State Railway Commission. *Reversed and dismissed.*

Byron Clark, Jesse L. Root and *J. W. Weingarten,* for appellant.

Grant G. Martin, Attorney General, and *W. T. Thompson, contra.*

HAMER, J.

Appeal from an order of the state railway commission in response to a complaint of one P. J. Postle to compel the relocation of a private farm crossing and substitute an overhead for a grade crossing. It was alleged in the complaint that Postle is a live stock dealer and farmer; that he is the owner of 160 acres of land described in the complaint, and across the corner of his land the railroad company has constructed and now operates a railway; that the present farm crossing over the railway is situated at the east end of a deep cut where it is impossible to properly observe the approach of trains; that its use is dangerous to man and beast, and, although he has requested the railway company to establish an overhead railway crossing, it refuses to do so. The railroad company, among other things, denied the allegations of the complaint, and alleged that the complainant purchased his farm long subsequent to the construction of its railway; that at the time its line was built the railroad company constructed a grade crossing over its railway for the use of the then owner of the land at a place and in a manner satisfactory to him. Therefore the complainant is estopped to contend for another or different crossing. It was further alleged in the answer that, notwithstanding the foregoing facts, the railroad company is willing to construct another grade crossing for complainant at a point easterly and more distant from the cut; that the construction of an overhead crossing will require the expenditure of a large sum of money, and will give the complainant a benefit and advantage not enjoyed by landowners generally in the state of Nebraska along the defendant's railway; will discriminate in his favor, and will amount to the taking of the railroad company's property without compensation, without due process of law, and in violation of section 3, art. I, of the Constitution of the state of Nebraska, and in violation of section 1 of the fourteenth amendment to the Constitution of the United States. The commission investigated the questions presented by the pleadings and made an order requiring the

railway company to construct and maintain an overhead crossing as prayed for by the complainant.

Appellant contends that the commission erred in assuming jurisdiction of the complaint, for the reason that its determination involved the adjudication of private rights, and therefore is an exercise of judicial power, with which the commission is not vested. There is some force in this contention, but we do not find it necessary to determine that question.

It is further contended, among other things, that the facts, as shown by the evidence, do not authorize the commission to require the railroad company to construct and maintain an overhead crossing for the exclusive accommodation of the complainant. Section 6042, Rev. St. 1913, provides: "When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same." In *Omaha & R. V. R. Co.* v. *Severin*, 30 Neb. 318, the court stated what an adequate crossing is, as contemplated by the statute. It appears that a crossing, as thus defined, had been constructed by the railroad company under an agreement entered into with the owner of the farm, when it obtained its right of way, and, so far as the record shows, that crossing has been maintained by the company and has been used by the complainant and his grantors for about 27 years without injury to any person. It also appears that the company obtained its right of way by condemnation proceedings in which it paid the owner of the land at that early date the sum of $1,900. This, of course, included the value of the land taken and the incidental damages to the rest of the farm, such as inconvenient use, and all other elements of damages. At that time the owner agreed with the railroad company on the location and construction of a private farm crossing. This crossing was constructed, and since that time there has been no substantial change of physical conditions. The present owner, being dissatisfied with the crossing, now insists that the railroad company construct for him an overhead crossing

at a cost of $1,000 and with a maintenance charge of at least $1,500. The present crossing does not in any way affect the public interest, but the crossing asked for simply suits the owner's private convenience. As we view the record, the order made by the commission was unjust, unreasonable, and oppressive, and may amount to taking the property of the railroad company without due process of law, and in violation of the Constitution of this state and of the United States. Again, to require the company to construct such a crossing as the commission has ordered in this case would discriminate unjustly in favor of the complainant and against all other persons similarly situated.

Finally, the evidence is not sufficient, as we believe, to sustain the order of the Commission. The railroad company contracted for this crossing and agreed with the former owner with respect to its location. It offers to construct a grade crossing easterly from the present location, to grade a wagon road for the plaintiff's benefit parallel to its railway, and to grade the approaches for that crossing without cost to the complainant. Nevertheless he insists that the railroad company should construct and maintain an overhead crossing for his private benefit. It would seem that the construction of such a grade crossing as we have described is sufficient, and that the evidence fails to show that the complainant is entitled to the overhead crossing which he demands.

The order of the commission is reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

ROSE, J., not sitting.

O. M. ROBISON, APPELLANT, V. JULIUS GEBAUER ET AL., APPELLEES.

FILED APRIL 3, 1915. No. 18766.

Highways: DEDICATION. Where a landowner has placed fences on each side of a traveled way across his land, leaving an intervening space of the width of a public highway, and the public has entered upon and used the intervening space as a highway for nearly ten years with the owner's acquiescence, dedication may be inferred, though such use has not continued for the entire statutory period of ten years.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Reversed with directions.*

Williams & Williams, for appellant.

G. J .Hunt, contra.

HAMER, J.

This is an action by a road overseer in Morrill county to enjoin defendants from fencing up a road across their premises. The district court refused to grant the injunction, and plaintiff has appealed.

Defendants took up their land as a homestead in May, 1903. The roadway in controversy crosses it. In the fall of 1903 defendants built a fence north of the roadway. In the spring of 1905 they built a fence further south, leaving a roadway about four rods in width. The public has used this open strip as a highway for a little less than ten years. The evidence tends to show a dedication to the public use and an acceptance by the public, though defendants deny that they intended to dedicate the roadway to that purpose.

In *Rube v. Sullivan,* 23 Neb. 779, it was said: "The authorities are not entirely in accord as to what length of time is necessary to create a presumption of the dedication of private property to the use of the public for a street or highway, for the reason, probably, that the presumption does not depend alone on the length of time,

other circumstances being necessary to be considered. Ten years' uninterrupted use will create the presumption, but a much shorter period will be sufficient, where the act of the owner from which the dedication is inferred is clear and unequivocal, and accompanied or immediately followed by public use. *Denning v. Roome,* 6 Wend. (N. Y.) 651; *Regina v. Petrie,* 30 Eng. Law. & Eq. 207. But unless there is some clear and unequivocal manifestation of an intention to dedicate, there will be no presumption of dedication until after the lapse of ten years."

The user by the public in this case is less than ten years, but acts of defendants evidencing their intent create a presumption of dedication. The space left between the two fences built by the defendants was about four rods, the width of a legal highway. Defendants' statement of intention is not conclusive. A text-writer says: "There is no reason why the ordinary rules of presumptive evidence should not apply to cases of dedication as well as to other cases where the title to real property is in controversy, and, if this be correct, it must follow that the person against whom the dedication is asserted should be held to intend the reasonable and necessary consequences of his act." 1 Elliott, Roads and Streets (3d ed.) sec. 175.

"The confusion in the authorities can, in a great measure, be cleared away by holding that the extent and character of the use may furnish evidence of intention to dedicate, although it has not continued for the statutory period, and that, when the user has been such as would indicate to prudent men that the public claim is, as of right, to the way as a street or road, and the owner is fully aware of the extent and character of the use and makes no objection, it will be presumed that he intended to throw the way open to the public. This rule does not dispense with the necessity of proving the *animus dedicandi,* but allows it to be inferred from legitimate evidence, and thus secures public and private interests from injury. It is, of course, generally essential that the use should be with the knowledge of the owner and without interruption from him, and that it should not be under a mere license, but that it

should be such a use as in its nature and extent asserts, by necessary implication, a claim of right. If the user falls short of this, it cannot be considered as supplying evidence sufficient, of itself, to authorize, as against the owner, the presumption of an intention to dedicate, although it may be material when connected with other evidence upon that question." 1 Elliott, Roads and Streets (3d ed.) sec. 179.

The rule stated in 13 Cyc. 482, is as follows: "Where land has been used continuously by the public with the owner's acquiescence for such a length of time that private rights and the public convenience and accommodation will be materially affected by an interruption of the enjoyment, a dedication will be presumed. Under these circumstances no specific length of user is necessary to constitute a valid dedication. It is not necessary that the use should be for the term of years necessary to presume a grant, but may be for a less term. But the length of time of enjoyment is a fact for the jury to consider as tending to prove an actual dedication and an acceptance by the public."

Under all the evidence in this case, it may fairly be said that defendants have dedicated the strip of land in controversy for a highway and the same has been accepted by the public. For this reason, the judgment of the trial court is reversed and the cause remanded, with directions to enter judgment for a permanent injunction in favor of plaintiff.

REVERSED.

MORRISSEY, C. J., not sitting.

STATE, EX REL. JOHN FITCH, APPELLEE, V. SAMUEL R. MCFARLAND, COUNTY CLERK, ET AL., APPELLANTS.*

FILED APRIL 3, 1915. No. 19025.

1. **County Commissioners: TERM OF OFFICE.** The term of office of county commissioners, in counties not under township organization, is four years. *Saling v. Bahensky*, 97 Neb. 789; *Calling v. Gilland*, 97 Neb. 788.

* On rehearing, judgment sustained. See opinion, p. 854, *post*.

2. **Mandamus: COUNTY COMMISSIONER: ELECTION.** Where it appears that there was no election to be held for the office of county commissioner of the first commissioner district of a county in the year 1914, it was error to award a writ of mandamus compelling the board of canvassers to count the votes for that office, and the county clerk to issue a certificate of election to a person whose name was written on the official ballot by some of the electors.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed and dismissed.*

Reed & Gill and *M. S. McDuffee,* for appellants.

Allen & Dowling and *H. Halderson, contra.*

Reese, Reese & Stout, amici curiæ.

HAMER, J.

This is an appeal from a judgment of the district court for Madison county, awarding the relator a peremptory writ of mandamus to compel the county clerk and the members of the board of canvassers to count the votes cast for him as commissioner of the first commissioner district of said county, at the general election of 1914, and to issue to him a certificate of election to that office. The petition for the writ set forth, in substance, that at the election of 1914 certain electors of the county wrote the relator's name on their ballots and thus cast their votes for him for that office; that there was no other candidate voted for by the electors of the county, and that therefore the relator was duly elected and was entitled to have the votes cast for him counted, and that he was entitled to a certificate of election. By the return to the alternative writ it was alleged, among other things, that there was no vacancy in the office of commissioner of said district No. 1, in said county, at the election of 1914, and no election was held for that office. The trial court, on the hearing, allowed the peremptory writ, and the respondents have appealed.

It appears from the record that one Watson L. Purdy was elected at the general election in 1911 commissioner for the first district of Madison county, for the full term of four years, commencing the first Thursday after the first

Tuesday in January of 1912; and at said election the relator and Purdy were rival candidates. In *Saling v. Bahensky*, 97 Neb. 789, and in *Calling v. Gilland*, 97 Neb. 788, it was held that in counties, like Madison, which are not under township organization, the term of county commissioner is four years. It follows that there was no election for the office of county commissioner in commissioner district No. 1 in 1914. The writ of mandamus should therefore have been denied.

The judgment of the district court is reversed and the relator's action is dismissed.

REVERSED AND DISMISSED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

JOSEPH H. TRAVIS, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 16, 1915. No. 18056.

1. **Appeal: TESTIMONY OF EXPERT.** When, in an action for personal injuries, the attending physician is called as a witness and gives evidence, which is improper in form, as to the permanent character of the injuries complained of, the irregularity will be *held* not prejudicial, where the witness explains his answers by giving a clear and detailed explanation of the objectionable testimony, and other evidence in the case, standing alone, justifies the verdict.
2. **Trial: INSTRUCTIONS.** "The true meaning of instructions is to be determined, not by a separate phrase or paragraph, but by considering all that is said on each particular subject or branch of the case." *Lincoln Traction Co. v. Brookover*, 77 Neb. 221.
3. ———: **REFUSAL OF INSTRUCTION.** It is not error to refuse to give a requested instruction, when the court on its own motion gives to the jury the substance of the instruction requested.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

John L. Webster and *W. J. Connell*, for appellant.

Weaver & Giller, contra.

MORRISSEY, C. J.

While alighting from one of defendant's cars, in the city of Omaha, plaintiff fell and sustained injuries, and brought this action to recover damages, alleging that the plaintiff had notified the conductor that he wished to alight from the car at Seventeenth and Cass streets, but, upon arriving at said point, the conductor failed to bring the car to a stop at its usual stopping place; that the car continued until it had passed at least 100 feet beyond its usual stopping place, when the plaintiff again asked the conductor to bring the car to a stop and permit him to alight. The car was then brought to a stop, and while plaintiff was in the act of alighting therefrom, but before he had sufficient time to do so, the defendant negligently and carelessly caused the car "to start suddenly with a jerk, and thereby threw plaintiff to the pavement," causing the injuries of which he complains.

The answer denies the allegations of the plaintiff's petition, and alleges that, as the car approached Seventeenth street traveling west, the conductor gave the signal for a stop at the next regular stopping place; that immediately thereafter the plaintiff stepped to the edge of the rear platform and down upon the step of the car; that the conductor warned the plaintiff not to alight until the car had stopped, but that plaintiff, in disregard of the warning, negligently stepped from the car to the street before the car had been brought to a stop; that the street was at that time covered with ice, making it especially dangerous to step from a moving car, and the plaintiff had full knowledge of this condition; that the car stopped in the usual way about ten feet beyond the point where the plaintiff stepped from the car to the street; and alleges that whatever injuries plaintiff received were due to his own negligence in stepping from the moving car before it had come to a stop. The case was tried to a jury, there was a verdict for the plaintiff, and defendant appeals.

The proof shows that in falling upon, or being thrown to, the pavement, plaintiff sustained a fracture of the el-

bow of the right arm, an injury to his back and hips, which is fully described in the testimony of Dr. Lee, hereinafter quoted, and a cut and bruise on the back of his head, which the doctor describes as: "It was simply a cut, but the trouble seemed to be more in the bone * * * than in the cut itself." Of this the doctor testified: "He complained of pain in the head, all through the head, particularly over the bone. * * * He complained of that a long time, even after the elbow and the skin had healed up and everything of that kind after he was up and around." The injury occurred March 13, 1912, and the trial was had in February, 1913. Plaintiff testified that he was still suffering much pain; that his arm was not so strong as before the injury; that his back still troubled him; that "if I will walk for very long at a time, an hour or more, I get an ache and pain in my hip and back, and I go and sit down." He testified to a pain in his head from time to time, and said he still had a roaring in his head and ear, and could not hear so well as before the accident. He was 42 years old, and prior to his injury had been earning $100 a month, or more, as a chauffeur, but he had not been able to work since the accident.

Complaint is made because the trial court permitted Dr. Lee, over the objections of defendant, to answer the following questions: "Q. Just tell the jury, the court and jury, Doctor, what is the probability of his ultimate recovery as to these injuries, especially to the arm and back and the head. * * * A. Well, it would be impossible for me to say whether they were permanent or not, any one of them; but they are injuries that could be permanent. Q. Just state now, Doctor, how the injury to the back could become a permanent injury. A. Well, the injury consisted in a wrenching and bruising of the muscles and ligaments and tendons, or muscles surrounding the spine and surrounding the muscles of the hips, and it would be impossible to say to what extent that would remain, and that was the reason I said it was impossible to state whether it would be permanent or not, but it would be liable to be on that account, because I couldn't

restore them to their former condition. Q. Now state, Doctor, how about his arm—the injury to the arm. Explain to the jury how that can be a permanent injury. A. Well, the arm could be injured to that extent for the reason that every broken bone leaves more or less of a weakness or defect in the bone which cannot be restored, and it always leaves—affects the structures, muscles, etc., surrounding the part that is broken, by the swelling, by the long continued disuse, and by the position which you are compelled to keep it in to form the knitting of the bones. Q. Then an injury to the head, such as the plaintiff in this case sustained, could produce that rumbling in the ear? A. Yes, sir; it could."

This line of testimony is properly subject to criticism. In place of stating what could happen and could result, he ought to have stated what in his opinion would be the natural or probable result. But this witness was cross-examined at length upon each question herein set out, and he described in detail the character and extent of each injury received. It will be noted, too, that he stated to the jury: "It would be impossible for me to say whether they were permanent or not, any one of them." It is true that he follows this by saying they could be permanent, and that part of the answer ought to have been stricken out. But he follows that answer by fully explaining the character of the injuries, and again stating that it is impossible for him to state whether the injuries would be permanent, but states that they would be liable to be permanent because he was unable to restore the muscles, ligaments and tendons to their former condition. Again, in explanation of the injuries to the arm, and his answer that the injuries to that member could be permanent, he gives his reason for the answer by stating: "Every broken bone leaves more or less of a weakness or defect in the bone which cannot be restored, and it always leaves—affects the structures, muscles, etc., surrounding the part that is broken, by the swelling, by the long continued disuse, and by the position which you are compelled to keep it in to form the knitting of the bones." The plaintiff had testified to a

rumbling in his head, and the doctor, in his testimony on that question, merely stated that this rumbling could be produced from the injuries. He did not say that it was so produced, and the most that can be said is that the testimony fails to show a permanent injury to the head or to the ear. The witness was subjected to an exhaustive cross-examination touching these injuries. He appears to have been an intelligent, candid witness, and we cannot find that the jury was misled as to the extent of the injuries received.

Eleven months had elapsed between the time of the injury and the trial, and plaintiff was earning over $100 a month prior to the injury; but from that time to the time of the trial he had been unable to follow his usual avocation or to earn anything. The loss of time alone would amount to $1,100. He alleges the disbursement of $100 for medical attention and nursing, which amount seems very small under the circumstances, and his total recovery was only $2,250. This does not indicate that much, if anything, was allowed for permanent injuries. The verdict rather indicates that the jury did not regard the injuries as of a permanent character, and we think it may be said that he was not allowed more than a reasonable amount for the loss of time, expenses incurred, and for the pain and suffering endured.

Error is assigned for the giving of certain instructions, and paragraphs therein are singled out for criticism. In *Lincoln Traction Co. v. Brookover*, 77 Neb. 221, and cases therein cited, this court has disposed of the question in the following language: "It is a well-established rule that instructions must be construed together, and if, when taken as a whole, they correctly announce the rules applicable to the issues and the evidence, they will be upheld, even though a single paragraph standing alone may be faulty. *Bartley v. State*, 53 Neb. 310; *Love v. Putnam*, 41 Neb. 86. The true meaning of instructions is to be determined, not by a separate phrase or paragraph, but by considering all that is said on each particular subject

or branch of the case." When this test is applied, we find no error in the charge of the court to the jury.

Again, error is assigned in the court's refusal to give an instruction requested by defendant; but the court, on its own motion, had given the substance of the instruction asked, and it was, therefore, properly refused.

The record being found free from error, the judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

EMMA F. COOK, APPELLEE, V. CITY OF NEBRASKA CITY, APPELLANT.

FILED APRIL 16, 1915. No. 18068.

Municipal Corporations: EXCAVATIONS IN STREETS: PERSONAL INJURIES: LIABILITY. The municipality of Nebraska City, in grading one of its streets, made a cut or execavation from three to five feet deep at the intersection of the street with a road or driveway, which led across private property and had been traveled as a road by the public for more than 20 years, but placed no barriers or danger signals at or near the intersection. Without knowledge of the excavation, plaintiff drove over the bank in the darkness and was injured. *Held*, that the city was liable for the injury.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Andrew P. Moran and *W. W. Wilson*, for appellant.

Livingston & Heinke, contra.

MORRISSEY, C. J.

Plaintiff brought this action against the municipality of Nebraska City to recover for injuries alleged to have been sustained August 17, 1912. It is alleged that some time prior to that date the defendant city graded down a portion of Ninth street, on the east side of block 41, four or

five feet below the natural surface of the ground, and that there was then, and for many years prior thereto, a road or public way leading across block 41 onto Ninth street; that, after changing the grade of Ninth street, the defendant and its officers negligently left the intersection of the road across block 41 unprotected and without lights or danger signals; that on the evening of that day, and after it had become dark, the plaintiff, while passing down this road across block 41 with a horse and buggy, drove over the bank and was thrown to the bottom of the grade, receiving severe and permanent injuries.

The defendant denies that there was a public road or street across block 41, and alleges that plaintiff turned aside from the traveled streets and alleys and drove into the cut from private premises, and that whatever injuries she received were caused by her own carelessness and negligence. There was a judgment for plaintiff, and defendant appeals.

The testimony shows that for over 20 years the public had used the road across block 41, although it had never been laid out as a street or highway, and no work had ever been done thereon. But the testimony shows that it required no work to fit it for travel, and one witness says: "It looked like a street; in fact, it was better than the street was." It is therefore essential to determine whether any legal obligation rested upon the city to erect barriers or place danger signals where this driveway intersected with Ninth street.

The facts in *City of Omaha v. Randolph*, 30 Neb. 699, are closely analogous to the case at bar. There the court said: "While a municipal corporation is not required to erect barriers or place danger signals to prevent persons from receiving injuries in entering its streets by private ways, yet it is bound to provide such guards or signal lights in the streets at dangerous places to prevent travelers from receiving injuries in entering such street by a usually traveled public road, although such road was never laid out as a highway or street."

When this doctrine is applied to the facts in this case, it must be held that the city was guilty of negligence in not erecting barriers or placing danger signals at the intersection of this highway with Ninth street.

Complaint is made for the giving, and refusing to give, instructions, but, having reached the conclusion that the city was bound to erect barriers, or maintain danger signals at the point where the accident occurred, the rulings of the court are found to be without prejudice to the defendant, and the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

REBECCA SCHLAIFER, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED APRIL 16, 1915. No. 18077.

1. **Appeal: NEW TRIAL: DISCRETION.** A motion for a new trial is addressed to the sound discretion of the court, and a decision of the district court in setting aside a verdict of the jury and granting a new trial will not be reversed unless it clearly appears that there has been an abuse of discretion.
2. **———: EXCLUSION OF EVIDENCE.** In an action for personal injuries, where the injuries are not denied, or the proof thereof is clear and uncontradicted, the exclusion of evidence relating to the extent of the injuries and going only to the measure of recovery is not reversible error, where the jury finds plaintiff is not entitled to recover anything for the injuries.

APPEAL from the district court for Douglas county: LEE S. ESTELLE and WILLIS G. SEARS, JUDGES. *Affirmed.*

DeBord, Fradenburg & VanOrsdel, for appellant.

John L. Webster and *W. J. Connell, contra.*

MORRISSEY, C. J.

Plaintiff brought this action, alleging that, November 20, 1910, she was a passenger on one of defendant's street

cars in the city of Omaha, and, while attempting to alight therefrom, at the regular stopping place at the intersection of Sixteenth street and Clark street, the car was suddenly started forward with a jerk, and she was thereby thrown violently to the pavement, suffering severe injuries, which are set out in detail in the petition. The answer denies that the car was started while plaintiff was in the act of alighting, but avers that after the car had passed beyond the regular stopping place the plaintiff voluntarily stepped from the car to the street while the car was moving, and that whatever injuries she sustained were the result of her own negligence, and denies all negligence or carelessness on its part. There was a verdict for plaintiff. A motion for new trial containing 21 separate assignments of error was filed. On hearing, this motion was sustained, the verdict set aside, and the cause set down for retrial. By leave of court plaintiff filed an amended petition, and the cause was again tried to a jury, and there was a verdict for defendant. Plaintiff then filed an alternative motion, praying: First, for judgment upon the verdict of the jury returned on the first trial, notwithstanding the order of the court granting a new trial; second, should the court refuse to enter a judgment on the first verdict, that it set aside the last verdict and grant a new trial of the case, assigning the usual grounds for new trial in causes of this character. This motion was overruled, judgment entered upon the last verdict, and the plaintiff appeals.

The errors relied upon are: First, setting aside the verdict and granting a new trial; second, refusal of the court to sustain plaintiff's motion for judgment upon the first verdict; and overruling the alternative motion to set aside the second verdict and grant a new trial. Taking up these assignments in their order: Did the court err in setting aside the first verdict?

The Code provides for the granting of a new trial by trial courts, and this provision is made for the purpose of affording the court an opportunity to correct errors in

its own proceedings without subjecting the parties to the necessity of an appeal.

The record is silent as to the special reason for setting aside the verdict. The court has great latitude in the exercise of its discretion, and the universal holdings of this court are to the effect that this discretion will not be interfered with where it sets aside a verdict and grants a new trial, unless it is clearly shown that some legal right of the party against whom the order is made has been disregarded. *Missouri P. R. Co. v. Hays*, 15 Neb. 224; *Sang v. Beers*, 20 Neb. 365.

"The granting of a new trial is largely within the discretion of the trial court. A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it." *School District v. Bishop*, 46 Neb. 850.

Again, in *Wells v. Cochran*, 84 Neb. 278, this court has said that an order setting aside a verdict and granting a new trial will not be set aside "unless it clearly and unequivocally appears that there did not exist any tenable ground to support said order, but that the court thereby abused its discretion."

Abuse of discretion in the trial court is not disclosed by the record. Reasonable minds might draw different conclusions from the testimony, and, indeed, the second jury on substantially the same evidence reached a different conclusion from that reached by the first jury, and the ruling of the trial court on this question will not be disturbed.

The sole complaint made as to the second trial is directed to the rulings of the court on the introduction of evidence. In the main this criticism goes to the exclusion of testimony bearing on the extent of the injuries received. There was clear proof of the injuries; in fact, the injuries were conceded, but the liability of the defendant was denied. The extent of the injuries could be material only as to the amount of recovery, and, the jury having absolved the defendant from all liability, the severity of the injuries was immaterial, and the exclusion of this evidence was not prejudicial. *Price v. Grzyll*, 133 Wis. 623;

Fraser v. California Street Cable R. Co., 146 Cal. 714; *Bierce v. Sharon Electric Light Co.*, 73 Conn. 300.

The other rulings on the introduction of evidence complained of have been examined, but, considering the form of the questions asked and the state of the record at the time they were propounded, they are found to have been without prejudice. The verdict is fully sustained by the evidence, and, as there are no errors appearing, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

C. B. NASH COMPANY, APPELLEE, V. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED APRIL 16, 1915. No. 18081.

1. **Telegraphs: DELAYED MESSAGE: DAMAGES.** For a breach of its contract to promptly transmit and deliver a message over its lines, a telegraph company is liable for such damages as may reasonably be supposed to have been in the contemplation of both parties at the time when the contract was made.
2. **———: ———: ———: PROOF.** Such damages being dependent upon the knowledge of the parties, proof of such knowledge, where the message is in cipher, may be made by evidence of facts and circumstances additional to such as are disclosed by the message itself.
3. **———: ———: ———: SUFFICIENCY OF EVIDENCE.** Substance of the evidence set out in the opinion, and *held* sufficient to sustain the verdict.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Brogan & Raymond, for appellant.

Crofoot & Scott and *W. C. Fraser, contra.*

BARNES, J.

Appeal from a judgment of the district court for Douglas county, in an action for damages for a failure to transmit and deliver a telegram. The facts alleged in plaintiff's petition may be briefly stated as follows: At 10:10 o'clock A. M., on Thursday, January 30, 1908, the plaintiff, the C. B. Nash Company, delivered to the Western Union Telegraph Company at its main office in the city of Omaha the following telegram: "Shearson, Hammill & Co., 71 Broadway, New York, N. Y. Outbreak tapestry preternatural. Collect. (Signed) The C. B. Nash Company." Across the face of the telegram was written in red ink "Rush." The message when translated reads: "Sell 300 American Smelting & Refining Company common stock at 68 1/8." At the time when the message was delivered to the telegraph company, the plaintiff had on deposit with Shearson, Hammill & Company 300 shares of the stock designated, and wished its brokers to sell the same as directed by the telegram. Had the defendant promptly transmitted and delivered the message, Shearson, Hammill & Company would have sold the stock at a price equal to or greater than that named. On February 1, 1908, plaintiff telegraphed Shearson, Hammill & Company to ascertain if the sale had been made, and was informed that the order to sell had not been received. On the 3d of February, 1908, plaintiff sent them a duplicate of the original message, which was received by them on the 5th day of February, 1908. Meanwhile the price of said stock had declined to $62.50 a share, at which price the stock was sold, and plaintiff was damaged, by the failure of the telegraph company to promptly transmit and deliver the message, in the sum of $1,986, for which, with interest, the plaintiff prayed judgment. The defendant's answer was a general denial. On the trial the court limited the measure of damages to the difference between the price at which the stock would have sold on January 30, 1908, had the telegram been duly transmitted and delivered, and the price at which the plaintiff could have sold the stock on February 3, 1908. The jury returned a verdict for the plaintiff for $600, with interest amount-

ing to $199, or a total of $799. Judgment was rendered on the verdict, and the defendant has appealed.

It appears that before the introduction of the evidence the defendant objected to the introduction of any testimony, because the petition failed to state a cause of action, the message in question being in cipher, and because its contents were not disclosed or made known to defendant. The objection was overruled. At the close of all of the evidence the defendant moved the court to direct the jury to return a verdict in its favor, claiming that there was no evidence before the court tending to show that defendant had notice of the nature and extent of the business covered by the telegram which would make defendant liable for the special damages claimed. The motion was overruled. The court also refused to instruct the jury that defendant would be liable for nominal damages only. These rulings constitute the defendant's assignments of error.

It appears that at the trial L. F. Crofoot, a witness for plaintiff, testified that he was the secretary, treasurer and director of the C. B. Nash Company; that the company maintained its office in the Omaha National Bank building since January 1, 1907; that the defendant company has maintained its office in the basement of the same building; that the business of the plaintiff, among other things, was the purchase and sale of stocks listed on the New York stock exchange; that such transactions were carried on by telegrams, wholly or partly in cipher, and open, sent and received by the Western Union Telegraph Company, through its office in the Omaha National Bank building; that such telegrams were sent to and received by Henry Clews & Company, Clark Dodge & Company, Shearson, Hammill & Company, W. P. Bonbright & Company, all New York stock brokers; that the plaintiff company used the same cipher code in messages sent to and received by Shearson, Hammill & Company, and the object in using the code was to save tolls; that Henry Clews & Company is one of the oldest brokerage houses in New York, and has had an extensive business for many years; that Clark

Dodge & Company have also been in business for many years and are prominent brokers; that Shearson, Hammill & Company have been in business a shorter period, but are prominently known as stock brokers; that the method of sending the telegrams was to have them written in the plaintiff company's office and sent down to the telegraph company's office for transmission, or delivered to a messenger of the telegraph company.

W. W. Umsted testified that for many years he had been manager of the Western Union Telegraph Company in Omaha; that the telegraph company and the C. B. Nash Company maintained offices in the same building; that, as manager of the telegraph company, he had charge of all of the business transacted in its general office in that building; that three or four clerks received the messages filed by the public for transmission at the counter in the general office; that he knew the C. B. Nash Company, and the business in which it was engaged; that its interests were large, and that it was frequently sending and receiving business messages through the telegraph company's main office; that he knew L. F. Crofoot was in charge of the plaintiff's business, and knew the C. B. Nash Company's interests were varied, and that telegrams sent and received by it related to business transactions, but he did not know whether it referred to smelter, or street railway, or to what it referred; that he could not say that any of plaintiff's messages did not relate to business transactions; that he knew that more or less of plaintiff's messages, received and sent, related to business transactions of importance; that cipher messages are common in the larger portion of all branches of important business, and are extensively used by brokers in all lines of commodities; that, knowing the business in which a concern is engaged, when a message is tendered to the telegraph company, written in cipher, he knew it related to a business transaction; that when such messages are received from a business concern it is assumed that they relate to business transactions; that stock brokers use cipher messages in transacting their business in buying and selling to a large extent; and it

was a common practice for stock brokers to send and receive messages in cipher relating to their business; that he would regard the message in suit as an important message, and that it was so classed, partly because it was the C. B. Nash Company's business and partly because of the word "Rush" written in red ink across the face of the message.

The following is the substance of a stipulation of facts introduced in evidence on the trial: For more than five years past Shearson, Hammill & Company have been engaged in business as stock brokers, buying and selling bonds and stocks on the New York stock exchange. During that time the said firm has maintained its New York office at 71 Broadway, also branch offices in the cities of Chicago and Denver. In conducting the business, said firm has seven private wires for transmission of telegrams in connection with its business, which wires are leased from the defendant. Said firm sends and receives daily by its own operators numerous telegrams over said wires relating to the purchase and sale of bonds and stocks on the New York stock exchange. Shearson, Hammill & Company had in use during the period mentioned a telegraphic cipher code for sending messages to and receiving messages from its customers. A copy of the code was attached to the stipulation and made a part thereof. Messages written in said code relating to the purchase and sale of bonds and stocks were frequently sent and received over defendant's wires during the period mentioned in paragraph 1, by Shearson, Hammill & Company and its customers, including plaintiff. Prior to January 30, 1908, plaintiff frequently sent to and received from Shearson, Hammill & Company messages in said code which were transmitted over defendant's lines between New York and Omaha, relating to purchases and sales of stocks. It was stipulated, however, that defendant did not admit by the stipulation, or by anything contained therein, that the defendant had knowledge or notice that any of the messages written in said code and sent and received over defendant's wires during the period mentioned did in fact relate to the pur-

chase and sale of bonds and stocks or that defendant had any knowledge or notice to what said messages related. A long list of messages, sent and received by the plaintiff company to different stock brokers at different points, but more especially in New York City, was received in evidence. It appears from a translation of the code that the word "outbound" means "sell for our account and risk." The stipulation also contains the statement that William W. Remey, manager of Shearson, Hammill & Company, would testify, if permitted to do so over defendant's objection, that, had the aforesaid telegram been promptly transmitted and delivered by defendant to Shearson, Hammill & Company, his firm would have sold 300 shares of the stock in question at $68 1/8 a share; that the New York stock exchange closed at 12 o'clock noon, Eastern time, on Saturday, February 1, and next opened for the transaction of business at 10 o'clock A. M., Eastern time, on Monday, February 3, 1908. The foregoing is, in substance, the evidence on which the cause was tried.

Defendant's first contention is that damages for loss of an expected sale or purchase, caused by a failure to deliver a purely cipher telegram, cannot be recovered; and, second, that if any recovery could be had the damages would be only nominal. Appellant supports these contentions by a long list of authorities, commencing with *Hadley v. Baxendale,* 9 Exch. (Eng.) *341, 26 Eng. Law & Eq. 398; and it may be conceded that, if the facts justified the application of the rules invoked by the defendant, these contentions should be sustained. From an examination of the record, we are constrained to hold that the rule contended for by the defendant should not be applied in this case. Section 7406, Rev. St. 1913, provides, among other things, that a telegraph company shall be liable for the nondelivery of and for all mistakes in transmitting messages by any person in its employ. This statute was construed in *Kemp v. Western Union Telegraph Co.,* 28 Neb. 661, *Western Union Telegraph Co. v. Kemp,* 44 Neb. 194, and again in *American Express Co. v. Postal Telegraph-Cable Co.,* 97 Neb. 701.

In our opinion the evidence in this case is sufficient to bring it within the rule announced in *Smith v. Western Union Telegraph Co.*, 80 Neb. 395, *Western Union Telegraph Co. v. Church*, 3 Neb. (Unof.) 22, *Baldwin v. United States Telegraph Co.*, 45 N. Y. 744, and *Brooks & Son v. Western Union Telegraph Co.*, 26 Utah, 147. In the case last cited it was said: "But the authorities hold, almost uniformly, that it is sufficient to create a liability on the part of a company for all damages directly and proximately resulting from the negligent acts of its agents in failing to transmit a message in the form in which it is delivered, or in omitting to send it at all, provided the message discloses enough of its nature and importance to put an ordinary and prudent person upon inquiry. * * * The first message herein showed on its face that it referred to a commercial transaction. This fact, together with the fact that respondent B. B. Brooks endeavored to send a second message relating to the same matter, with the word 'RUSH' written conspicuously thereon, was notice to the appellant that these messages were important, and, if appellant had desired any further information on this point, it no doubt could have obtained it by inquiring of Brooks when he delivered the message to appellant for transmission over its wires."

The message in question in this case on its face, though in cipher, would furnish a person of ordinary prudence notice that it was important; and this fact, taken together with the course of business that had obtained between the plaintiff and the defendant company for many years, was sufficient notice to the defendant that substantial loss might follow its failure to promptly transmit and deliver the message to Shearson, Hammill & Company. We are therefore of opinion that the district court did not err in refusing to sustain the defendant's motions and in submitting the case to the jury. A verdict having been rendered in favor of the plaintiff upon this evidence and the instructions of the court, we feel constrained to sustain the verdict. We are aware that the question is a close one; but, on an examination of the whole record, we are of

opinion that the defendant had a fair trial, that it was chargeable with notice of the importance of the plaintiff's message, and that substantial loss would follow a failure to promptly transmit and deliver it.

The record being without reversible error, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

JOHN HEROLD, APPELLEE, V. UNITED STATES EXPRESS COMPANY, APPELLANT.

FILED APRIL 16, 1915. No. 18096.

1. **Carriers: SHIPMENT OF LIVE STOCK: LIABILITY.** While a common carrier of live stock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, yet, where animals are shipped, it is its duty to exercise such care as the circumstances indicate is reasonably necessary in order to safely transport them, and if, on account of a failure to exercise such care, the animals are injured, are lost, or die, the carrier may be liable in damages.
2. ———: ———: **REASONABLE CARE: QUESTION FOR JURY.** Where the evidence shows that, where a large hog is shipped in a crate in hot weather, reasonable care requires that it be cooled at intervals by wetting the animal and the bedding in the crate, and that it be furnished plenty of water, the question whether such care was exercised by the carrier, taking into consideration the size of the animal, the heat of the day, the manner of crating, and all the surrounding circumstances, is one for the jury.
3. **Evidence** examined, and *held* to support the verdict.

APPEAL from the district court for Pawnee county: JOHN B. RAPER, JUDGE. *Affirmed.*

Hazlett & Jack and *Walter Vasey*, for appellant.

J. C. Dort, contra.

LETTON, J.

On May 26, 1911, the plaintiff delivered to defendant two brood sows properly crated for transportation to Newton, Mississippi, which were never delivered. This action is brought to recover the value of the sows and crates. The jury found for plaintiff, and defendant appeals.

The principal error relied on is that the evidence is not sufficient to sustain the verdict. Receipt of the hogs and failure to deliver them was admitted by the defendant. Defendant insists that the evidence conclusively shows that the loss of the sows was caused by the excessive heat and the inherent nature and propensities of the animals. On the other hand, the plaintiff, insists that, the defendant having accepted the animals for shipment, it was bound to provide food and water, and exercise such other care as was reasonably necessary under the conditions and circumstances for their safe transportation; that the evidence failed to show the exercise of such care, and shows neglect to see that the hogs were properly fed, watered and cooled.

The testimony for the defense shows that the sows were loaded at Lewiston, Nebraska, about 1:30 P. M.; that the thermometer stood about 90 degrees; that they were properly cooled at Horton, where they were loaded on a train bound for Topeka, where they were again changed to a train running to Kansas City. The agent at Topeka testified that when they were received they were apparently pretty warm and when unloaded were left upon the platform so as to receive as much air as possible; that they appeared to cool down and were in good condition when loaded for Kansas City, which was reached at 1:40 A. M. next morning. The messenger in charge to Kansas City said that when they reached there the hogs appeared to be in good condition, but that he did not feed nor water them. At Kansas City they were placed in an express car for St. Louis about 8 A. M., and were then in good condition. Mr. Moritz, the express messenger between Kansas City and St. Louis, testified that the crates were placed opposite open doors in an express car; that he observed at a certain point that the two sows were very warm and restless; that they

ate a little food, and that he offered them water about 35 or 40 miles east of Kansas City, but they refused it and rooted the basin away; that they were not in the car where he worked; and that about an hour or an hour and a half afterwards, 3½ hours after they left Kansas City, he noticed, at a point a few miles east of Winslow, that a slat at the head end of one of the crates had been gnawed, and that one of the hogs was gone; that he wired the loss of the hog to the route agent, and a search was made, but she could not be found; that the end slats were nailed to the ends of the side slats of the crates; that the other sow was overheated; that he offered it water, which it refused, but did not offer it food; that it was frothing and bleeding at the mouth; that she jumped around in the crate and seemed wild and ferocious; that he turned this sow and the empty crate over to the agent at St. Louis about 8 o'clock in the evening. On cross-examination he said he noticed the hog was frothing at the mouth about three-quarters of an hour after leaving Kansas City, but did not water it then or try to cool it off, and that he offered water one-half or three-quarters of an hour afterwards, and that he threw no water on the hogs nor watered them, except as stated, though he saw they were getting hot; that he took all the straw out of the crates because he thought they would be cooler without it. He had handled a great many hogs. The crate was in good condition when it left Kansas City. The agent at St. Louis and another witness testified the sow was very hot when she came in, was panting, and had been gnawing the crate. He thought the crate was large enough; that the sow was offered food and water three or four times after arrival at St. Louis, and she was placed in the basement of the express office, where it was cooler, but she died about 11 P. M. The temperature was about 92 degrees. The agent also testified, as an expert, that it was extremely dangerous to carry a hog by express when the temperature was so high.

The plaintiff testified that the sows were due to pig in about two weeks; that the two of them weighed about 640 pounds; and that they were full-blooded, registered

Poland-China; that they were in the very pink of condition; that they were placed in strong crates with attached feed troughs and water buckets so that they could be fed and watered; that they had been washed off and crates bedded with wet alfalfa a few minutes before they were loaded; that he had been in the hog shipping business for about 8 years; that these crates were in standard form, and he had shipped and received a great many hogs in crates of this kind without any trouble. The slats on the front end of the crate were of seven-eighths inch lumber and were nailed to oak corner posts. On rebuttal the plaintiff testified, as an expert that he heard the testimony of Moritz that he removed the bedding from under the hogs when it became too hot in the car; that what should have been done was that the bedding should have been wet around the belly and lower sides of the hog until the hog cooled down. Other expert witnesses testified that the proper method is to have the bedding wet down at proper intervals, and the legs and lower part of the body cooled; that a bucket full of water would pretty thoroughly wet the hog and the bedding, and this would be required from one to two hours apart on such a day.

We think defendant has not definitely proved that the sows were watered or cooled off at Kansas City, the two witnesses each saying that the sows had been watered; but, when pressed on cross-examination, each said that he did not see them watered and did not know that they had been fed or watered, but he saw water about the pan in the crates.

From the time the sows were cooled down at Horton and watered at Holton, Kansas, in the early evening of the 26th, no attempt was ever made to cool them by the use of water, which the evidence shows was plainly necessary in such weather, to the knowledge of the employees of the express company. After Moritz took the bedding away, even this could not have been effectively done. When offered water that forenoon, they had become so restless and uneasy that they refused it. It was an hour or an hour and a half afterwards before the first sow was missed.

Its escape was in all probability due to its frantic efforts to procure relief. Apparently no attempt was made to water or cool the other sow until after she reached St. Louis. It seems to us that, if the sows had been watered and cooled down at Kansas City, they would not have shown the symptoms they did so soon after leaving there. How often they should have been cooled depended on the temperature of the day and of the hogs. Moritz knew they suffered from heat, but did nothing that whole day but offer them a little food and water, which is shown to be ineffective care. We are also of the opinion that the crates were sufficient. Under these circumstances, the evidence fails to show that reasonable care was taken for the safe carriage of these animals.

An inspection of the instructions shows that the principles of law governing the case were properly laid down, and the defendant makes no complaint that the jury were misdirected.

The evidence sustains the verdict, and the judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

H. E. BULLOCK, APPELLEE, V. POWER-HEAFEY COAL COMPANY, APPELLANT.

FILED APRIL 16, 1915. No. 18054.

1. **Evidence: CONTRACT: DATE OF EXECUTION.** A contract reciting the date of its execution is *prima facie* evidence that it was executed at that time.
2. **Partnership: FIRM PROPERTY: APPLICATION TO INDIVIDUAL DEBTS.** In the absence of fraud or conduct constituting an estoppel, a partner, without the consent of his copartners, cannot apply firm property to the payment of his individual indebtedness.
3. **Trial: DIRECTION OF VERDICT.** It is not error to direct a verdict for plaintiff, where the evidence is sufficient to support his cause of action, but is insufficient to sustain the only defense pleaded.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Smyth, Smith & Schall, for appellant.

Brown, Baxter & Van Dusen, contra.

ROSE, J.

This is an action to recover $1,783.95 for coal sold to defendant and delivered in Omaha, Nebraska. The fuel was furnished by Bullock & Hickey, a partnership having its place of business at Fort Smith, Arkansas. The firm was composed of H. E. Bullock and E. G. Hickey, but the former succeeded to the rights of both, and is plaintiff herein. It is admitted that Bullock & Hickey shipped the coal and that it was received by defendant, but the following defense is pleaded: Prior to May, 1911, Hickey was indebted to the Hart-Williams Coal Company in a sum exceeding $1,600. As surety, defendant incurred liability for the debt, and Hickey agreed to furnish coal to pay it. Plaintiff had consented to the arrangement thus made, and the coal was shipped and received with that understanding. The proceeds of the shipments were applied to the payment of the debt for which defendant had become liable as surety for Hickey. At the close of the testimony the trial court directed a verdict for plaintiff. From a judgment in his favor for $1,860.28, defendant has appealed.

Defendant contends that the evidence is sufficient to establish the defense pleaded, and that therefore there was error in the peremptory instruction for plaintiff. Is the evidence sufficient to sustain a finding that plaintiff consented to the payment of his partner's individual debt with partnership property? No witness testified that Bullock gave his consent to such an arrangement. There is no writing to that effect. Hickey intimated in his oral testimony that a purpose on his part to pay in coal an individual debt owing by him to defendant had been communicated to plaintiff, but proof of this character is inconsistent with a letter written by Hickey to Bullock. Is consent implied from proved facts or circumstances? In

testifying in regard to plaintiff's knowledge, to the time it is said to have been obtained and to its relation to the partnership, Hickey, as a witness for defendant, in referring to plaintiff, said: "The only conversation I had with him was this one conversation. As to whether that was immediately before or immediately after signing the papers, I say I do not remember." The partnership contract is in the record, and error in admitting it is not shown. It recites its execution March 31, 1911. This is *prima facie* evidence of that fact. 4 Wigmore, Evidence, sec. 2520; 2 Chamberlayne, Modern Law of Evidence, sec. 1055; 1 Jones, Commentaries on Evidence, sec. 51; *Sinclair v. Baggaley,* 4 Mees. & Wels. (Eng.) *312; *McFarlane v. Louden,* 99 Wis. 620; *Hauerwas v. Goodloe,* 101 Ala. 162; *Leonard v. Fleming,* 13 N. Dak. 629. The presumption is not destroyed by other proof. Hickey's indebtedness to Hart-Williams Coal Company is evidenced by a note for $1,498.51, dated May 4, 1911. Defendant then became liable as indorser. Its manager testified he was told by Hickey, after the execution and indorsement of the note, that hard coal would be delivered to defendant to cover the indebtedness evidenced by the note to Hart-Williams Coal Company. The consent pleaded by defendant applied alone to hard coal. The first coal shipped was soft coal. It came from Bullock & Hickey. Defendant's manager admitted on the witness-stand that he knew where it came from shortly after it was received. The amount of capital to be contributed to the partnership business was $2,000, each partner to pay $1,000. The evidence is uncontradicted that Hickey paid no money, but that Bullock accepted his note for his share of the capital and agreed to allow him a salary of $125 a month. In the bill of Bullock & Hickey for coal shipped to defendant, the first item is dated May 11, 1911, and the last August 8, 1911. Plaintiff testified positively that he had no knowledge of Hickey's purpose to pay an individual debt with firm property, until after the coal had been delivered.

As already stated, there is no proof of a written or oral promise on the part of plaintiff to apply partnership prop-

erty to the payment of his partner's individual debt. The evidence tends to show that defendant's liability as an indorser was incurred long after plaintiff gave his alleged consent to the application of partnership property to the payment of the individual debt of his partner. Defendant, in buying and in receiving soft coal through Hickey, knew the seller was the firm of Bullock & Hickey. Considering that no cash was invested in the partnership business except $1,000 contributed by plaintiff, that Hickey's partnership note for $1,000 remained unpaid, and that the firm had obligated itself to pay Hickey $125 a month for his services, it is too much to assume, without proof, when all of the circumstances are considered, that plaintiff impliedly consented to turn over to a creditor of Hickey firm property worth more than $1,600. In making reference to some of the controlling facts of which there is proof, no item of evidence adduced by defendant has been overlooked. The issue is controlled by the rules: "That a partner cannot, without the consent of his copartners, apply the firm property in satisfaction of his individual liabilities; and that the burden is cast upon the person receiving the property to prove either consent of the other partners or facts creating an equitable estoppel." *Columbia Nat. Bank v. Rice*, 48 Neb. 428.

Estoppel is not pleaded nor proved. Fraud is not shown. The evidence would not support a judgment in favor of defendant. The trial court made no mistake in directing a verdict for plaintiff.

AFFIRMED.

FAWCETT, J., not sitting.

FARMERS LOAN & TRUST COMPANY, APPELLANT, V. WALTER PLANCK, APPELLEE.

FILED APRIL 16, 1915. No. 18059.

Bills and Notes: NEGOTIABILITY. A promissory note is not rendered nonnegotiable by the insertion of the following provision: "A discount of 6 per cent. will be allowed, if paid in full within fifteen days from date."

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

M. S. McDuffee, for appellant.

William V. Allen and *William L. Dowling, contra.*

ROSE, J.

This is an action on a promissory note for $587, dated August 30, 1909. The principal is payable in six instalments maturing at different times within 13 months. The Equitable Manufacturing Company is named as payee and defendant is maker. By mesne assignments plaintiff, September 1, 1909, became the holder of the note as collateral security for a loan. The instrument, when executed, was attached to a contract for the purchase of jewelry and it was given for the price thereof. Under the terms of sale defendant was entitled to the possession of a piano to be given as a prize to the holder of the largest number of jewelry certificates issued by defendant to purchasers of goods from him. Plaintiff claims to be a holder of the note for value before maturity. In his answer defendant pleaded that the note was obtained by fraudulent representations; that he immediately rescinded the contract of purchase; and that he never received the jewelry or the piano. Upon a trial of the issues the district court directed a verdict in favor of defendant, and plaintiff has appealed.

Defendant contends that, under the rule in *Bothell v. Schreitzer,* 84 Neb. 271, the note in controversy is not ne-

gotiable, and that even a *bona fide* holder cannot recover in an action thereon. When Planck signed the note it was attached to the order for goods to be shipped, but was separated therefrom by a perforated line, above which were these words: "The instalment note below to be detached by Equitable Mfg. Co." The contract of sale also contained the following: "If goods are shipped, detach and credit my account with attached instalment note which I hereby give in payment of this bill. If goods are not shipped, note is to be returned to me." In the *Bothell* case the note was glued to the contract of sale and was unlawfully detached. In the present case, when the goods were shipped, the note was detached according to agreement. The rule in the *Bothell* case is correct, but is inapplicable here.

The note executed by defendant contained the following provision: "A discount of 6 per cent. will be allowed, if paid in full within fifteen days from date." Is the negotiability of the note thus destroyed? Under the statute an instrument, to be negotiable, "must contain an unconditional promise or order to pay a sum certain in money." Rev. St. 1913, sec. 5319. The act of the legislature defines what a "sum certain" is, but does not mention discount. Rev. St. 1913, sec. 5320. The authorities upon this point are in conflict. In the following cases it is held that such a note is nonnegotiable: *Fralick v. Norton*, 2 Mich. 130; *Story v. Lamb*, 52 Mich. 525; *Way v. Smith*, 111 Mass. 523; *National Bank of Commerce v. Feeney*, 12 S. Dak. 156; *Farmers Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 40 L. R. A. n. s. 177.

Story v. Lamb, 52 Mich. 525, follows the holding in *Lamb v. Story*, 45 Mich. 488. In *Kirkwood v. First Nat. Bank*, 40 Neb. 484, this court said: "In *Lamb v. Story*, 45 Mich. 488, it was held that the negotiability of a note payable on or before two years from date was destroyed by a memorandum attached, providing that if paid within one year there should be no interest, and that case is cited by Mr. Daniel in support of a similar statement, and is the only authority cited. We are not satisfied with that doctrine. In *Hope v. Barker*, 112 Mo. 338, the provision was 'with-

out interest thereon if paid at maturity; if not paid at maturity, to bear interest from date.' It was held that that provision did not destroy the negotiability of the note, the note on its face showing what should be paid at any particular time, and being therefore certain in its terms."

In *Farmers Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 40 L. R. A. n. s. 177, it is held that a provision in a note similar to the one now in controversy impairs its negotiability. This decision rests upon *Randolph v. Hudson,* 12 Okla. 516, and South Dakota cases therein cited.

In *Randolph v. Hudson,* 12 Okla. 516, it was held that a provision, "with interest at the rate of 12 per cent. from date, if not paid at maturity," destroyed the negotiable character of the note. This is contrary to *Hope v. Barker,* 112 Mo. 338, cited with approval in *Kirkwood v. First Nat. Bank,* 40 Neb. 484.

Oklahoma also holds that a provision for an attorney's fee, if the debt is not paid at maturity, renders the note nonnegotiable. This is contrary to the holding in *Stark v. Olsen,* 44 Neb. 646, and is inconsistent with the negotiable instruments law. The Oklahoma cases were decided under local statutes in force when the notes were executed, and in the *McCoy* case the court says that it does not decide what the result would be under the negotiable instruments law subsequently adopted by that state. The Oklahoma decisions were rendered under the following statutory provisions: "A negotiable instrument must be made payable in money, only, and without any condition not certain of fulfilment," and "must not contain any other contract than such as is specified" in the statute. These provisions were adopted from South Dakota, and the Oklahoma cases follow the South Dakota construction.

In *National Bank of Commerce v. Feeney,* 46 L. R. A. 732, 737 (12 S. Dak. 156), it is held that "a stipulation for a discount of 12 per cent., if a note is paid before maturity, renders it nonnegotiable because of the uncertainty as to the amount to be paid," and the court quotes an earlier decision containing the following language: "While, in the opinion of the writer, a promissory note,

otherwise unobjectionable, meets the requirements, and stands the test of negotiability, when there is no date at which the exact amount then due cannot be ascertained by inspection and computation, this court has placed itself in line with a class of authorities which require such a degree of certainty that the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfilment; and the rule thus established must control cases subsequently arising, where the facts are substantially the same."

The doctrine thus stated is in conflict with some of the Nebraska decisions and with the negotiable instruments law. *Kirkwood v. First Nat. Bank,* 40 Neb. 484; *Stark v. Olsen,* 44 Neb. 646; *Fisher v. O'Hanlon,* 93 Neb. 529; Rev. St. 1913, secs. 5320, 5322.

In *Loring v. Anderson,* 95 Minn. 101, it is held that a note providing for a discount of 6 per cent., if the debt is paid on or before maturity, does not make the instrument nonnegotiable, as the amount of the deduction is readily ascertainable from the face of the paper. To the same effect is *Harrison v. Hunter,* 168 S. W. (Tex. Civ. App.) 1036. This is in harmony with the statutory and the general rule that a note is negotiable, though payable on or before a certain date. Rev. St. 1913, sec. 5322. The amount of the discount and the amount due on the note in controversy, if paid within 15 days from date, are sums readily ascertainable.

With the question of negotiability determined in favor of plaintiff, the peremptory instruction for defendant is erroneous. Whether plaintiff is a "holder in due course," within the meaning of the statute, and whether there was fraud on the part of the original payee are issues not determined on this appeal. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

F. F. MCELHINNEY, APPELLANT, V. JOHN H. HARTE, APPELLEE.

FILED APRIL 16, 1915. No. 18009.

1. **Bills and Notes: FAILURE OF CONSIDERATION: SALE OF STOCK.** Where a promissory note is given for stock in a corporation then being organized by the payee, in reliance upon the promise of the payee to place in the treasury of the corporation it is organizing a certain sum of money and a bond of indemnity guaranteeing the legality of the patents under which the corporation being organized is to operate, and the payee fails to either deposit the said sum of money or furnish the said bond of indemnity, and the evidence shows that such failure on the part of the payee renders the stock in said corporation valueless, the consideration for the note will be held to have totally failed.
2. ———: ———: ———. And where it further appears that, on account of such failure, the maker of the note has refused to take the stock, a judgment in his favor in an action on the note will, in the absence of other reasons to the contrary, be affirmed.
3. **Evidence** examined and set out in the opinion *held* to sustain the verdict and judgment.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

William Baird & Sons, for appellant.

Myron L. Learned and *Matters & Matters, contra.*

FAWCETT, J.

From a verdict and judgment of the district court for Douglas county, in favor of defendant, in an action upon three promissory notes, plaintiff appeals.

The three notes involved were for $6,500 each, maturing on different dates. As each note matured, an action was commenced thereon. After the commencement of the third action, the three were combined and tried as one, and will be referred to in the singular number as one action. The petition alleges that defendant, being indebted to Thomas H. Matters, of Omaha, executed and delivered to him the

notes in suit; that the notes were by Matters duly and legally assigned to plaintiff prior to their maturity; and that plaintiff is now the legal owner and holder thereof. The answer denies generally all allegations not expressly admitted; admits the making and delivery of the notes; but alleges that they were given for stock in the Nebraska Mausoleum Company, "a corporation promoted and organized by the plaintiff herein and the Iowa Mausoleum Company, of which this plaintiff is president;" that at the time the notes were given it was agreed by and between plaintiff, through his legal representative, and the defendant that plaintiff would on or before the 1st day of February, 1911, place in the treasury of the Nebraska company the sum of $49,000 in cash, for the use and benefit of the Nebraska company; that, in addition thereto, plaintiff agreed with defendant that the Iowa company and plaintiff would give an indemnity bond to the Nebraska company, protecting the latter against infringement of the patents purchased by it from plaintiff and the Iowa company; that defendant relied on these representations and agreements, and was thereby induced to subscribe for such stock and execute the notes; that "without the indemnity bond furnished, and without the amount of money deposited in the treasury of the company in accordance with the contract of the plaintiff, said stock is without value;" that with the said sum placed in the treasury and the indemnity bond furnished, the stock would be worth one hundred cents on the dollar. The reply denies the allegation that it agreed to place the sum of money named in the treasury and agreed to give the Nebraska company an indemnity bond; avers that the Iowa company sold the right to the use of the patent in the state of Nebraska to the Nebraska company and assigned the same to such company, and in the assignment agreed to indemnify the Nebraska company against any infringement of the patent right so sold and assigned to it; that said provision in the deed of assignment was the only agreement made by plaintiff or the Iowa company, and is full and complete indemnity to the Nebraska company against any and all liability

on account of attempted infringement of its patent right so assigned; that the Iowa company is fully solvent and financially responsible and able to make good its contract of indemnity; denies that plaintiff agreed to deposit the sum of money named; "and, by leave of court, for further reply to the answer as amended avers that said notes were given to Thomas H. Matters for stock of the Nebraska Mausoleum Company on representations made by Matters, and assigned by said Matters in payment of $17,800 which he owed the plaintiff, and the defendant is estopped to deny their validity." It is admitted that plaintiff holds the notes for the Iowa company, and that any defense which could be urged against that company can be urged against him.

The errors assigned are: (1) The court erred in refusing plaintiff's request for an instruction for judgment, for the reason that the only defense pleaded is failure of consideration, which was not sustained by any evidence; (2) the court erred in giving instruction No. 6; (3) the court erred in giving instruction No. 7; and (4) "the court erred in assuming by his instructions that the defense pleaded consisted of fraudulent statements of facts by which the defendant was induced to sign the notes, while, as shown by the pleading itself, as well as by the evidence, the defense was not that there was any fraudulent statement of fact which induced the making of the notes, but promises which had not been performed; and, there being no dispute as to the solvency and financial responsibility of the Iowa company, but abundant evidence of its financial ability, the court manifestly misconceived the defense pleaded." A consideration of the first assignment practically disposes of all. The evidence shows that the Iowa company was the owner for Iowa, Nebraska, and a number of other states, of patents 858,070 and 915,000; that it desired to dispose of its rights under those patents for the state of Nebraska, and in order to accomplish that purpose it undertook the organization of a Nebraska company. With this purpose in view, it sent its representative, a Mr. Little, to Nebraska to undertake such organization.

After arriving at Omaha, Mr. Little called at the office of Thomas H. Matters and took the matter up with him. The result of these negotiations was that Mr. Matters' co-operation was secured, and a contract was entered into between him and the Iowa company that he should enter into the management and incorporation of the Nebraska Mausoleum Company, with its headquarters at Omaha, and with a capital of $200,000. The contract (Exhibit 7) recites that the Iowa company is the owner of the patent rights for Nebraska, and that "the object of the organization of the Nebraska Mausoleum Company is to take over or purchase from the second party (the Iowa company) said territory, and to pay to the second party fifty-one (51) per cent. of its stock for all of the rights" in and to the patents for Nebraska. "And the first party (Matters) will also manage and control the sale of said stock in the state of Nebraska, and the second party has this day paid to the first party twenty-five hundred dollars ($2,500) as advance expenses in and about the organization of the said company and sale of said stock; and first party has agreed to sell said stock at par value, to the amount of one hundred and fifty thousand dollars ($150,000) within ninety (90) days from this date, and, in case he fails to do so, he agrees to return twenty-five hundred dollars without interest to the second party, in full cancelation of this agreement on his part. The question of commission for the sale of said stock is to be made by E. E. Little, representative of the party of the second part, and the party of the first part; it being fully agreed and understood between the parties hereto that fifty thousand dollars ($50,000) of stock shall be placed in the treasury and not sold, and the proceeds of forty-nine thousand dollars ($49,000) worth of said stock, so sold, shall be placed in the treasury. The balance of said money shall be paid to the parties of the second part for their fifty-one (51) per cent. of the said stock."

Little either had with him, or within a few days thereafter received from the Iowa company, a paper known as "Nebraska Prospectus" (Exhibit 13). This document contained the following language: "A mausoleum com-

pany is to be organized in the state of Nebraska by the Iowa Mausoleum Company with a capital stock of $200,000. The Iowa company will furnish two men experienced in the business, who will be capable of looking after the details of the business, and are experienced salesmen for crypts. The Iowa company controls three patents covering this mode of interment, and the use of the same in the state of Nebraska will be turned over to the Nebraska company." This prospectus was used by Little, in conjunction with Matters, in their efforts to secure subscribers for stock in the Nebraska company. Matters and Little discussed the question of commission for the sale of stock, which, by the terms of the contract between Matters and the Iowa company, they were to adjust, and agreed between themselves upon $30,000 as the amount which they ought to receive for such commission, $10,000 of which was to go for expenses, and the remaining $20,000 divided equally between them. $150,000 worth of stock was not sold within 90 days, as provided by the contract, and thereupon Matters returned to the Iowa company the $2,500 which had been advanced him for expenses. Mr. Little remained in Omaha, assisting Matters in securing subscriptions for stock. A little later on, Doctor Shallenbarger appeared upon the scene, and was introduced to defendant as the treasurer of the Iowa company. Defendant testified that he had a talk with Mr. Little and Doctor Shallenbarger, and that they represented to him that there would be put in the Nebraska company treasury $50,000 in cash for working capital, and another $50,000 of the stock of the Nebraska company which would be treasury stock, and also told him that they would put up an indemnifying bond; that he never received any stock in the Nebraska company from either the Nebraska or the Iowa company for his notes, and that he would not have executed the notes if the representations, to which he testified, had not been made; that he did not know Mr. Matters until he met him at the time of the interview to which he testified. Mr. H. K. Burket, president of the Nebraska company, testified, corroborating the testimony of defendant as to his interview with Little and

Doctor Shallenbarger; that Shallenbarger was treasurer of the Iowa company; that Shallenbarger represented to defendant, before he subscribed for his stock, that they were going to organize a Nebraska company with $200,000 capital; that $50,000 cash was to go to the Nebraska company for working capital, and $50,000 was to be put in the treasury as treasury stock, and $100,000 was to go to the Iowa company for their patent, and that they were to give an indemnity bond; that the Iowa company did not place the $50,000 in the treasury, nor furnish an indemnity bond. He also testified that Mr. Matters was not a subscriber for stock in the Nebraska company, but that he was assisting Mr. Little of the Iowa company in promoting the Nebraska company. Mr. Little testified that he visited Omaha with the intention of promoting a company for the Iowa company, as their representative, and that he came to Omaha under the Iowa company's direction. In every essential detail he corroborates the testimony of defendant. Mr. Burket also testified, as did Mr. Pinney, secretary of the Nebraska company, and Mr. Goodell, and defendant himself, that, without the $50,000 in cash in the treasury for operating expenses, and the indemnity bond for the protection of the patents, the stock of the Nebraska company was valueless. Mr. Little also testified that he said to defendant that he and Matters were to sell $49,000 or $50,000 of stock, and the money was to go into the treasury of the Nebraska company; that they were employed to sell the stock, and that he told the persons to whom he sought to sell stock in the Nebraska company that he came to Omaha to organize a company for the Iowa company; that the Iowa company sent him $50 a week; that his purpose in coming to Omaha originally was to organize a company on behalf of the Iowa company, and that he supposed he showed the prospectus to defendant, and that he talked with defendant, prior to the time of his subscription, respecting the prospectus.

In the light of the above testimony, it is idle to claim that Mr. Matters was not the duly authorized agent and representative of the Iowa company in everything he did

in relation to the organization of the Nebraska company and the soliciting of sales of stock in such company. In taking the notes from defendant, payable to himself, he was taking them for the Iowa company. This being true, all transactions between the Iowa company and Matters, in relation thereto, were matters with which defendant had no concern. He gave the notes in controversy for his subscription to stock in the Nebraska company, under the statement made by the Iowa company's representatives that the Nebraska company was being organized by the Iowa company, and that the Iowa company would place in the treasury of the Nebraska company for operating expenses $50,000 in cash and $50,000 worth of treasury stock, and furnish the Nebraska company an indemnifying bond as a guaranty of the validity of their patents and a protection against infringement thereof. It failed to deposit either the money or the bond. That failure, under the testimony of the witnesses, rendered the stock in the Nebraska company valueless. This testimony is not controverted. There was, therefore, a total failure of consideration for the notes. But it is urged by plaintiff that the general principle is that the failure to perform promises which relate to future obligations does not constitute failure of consideration of a note. There are cases which, under certain circumstances, so hold; but, as applied to the facts shown in the case at bar, we do not think a case can, or ever will be found, to sustain plaintiff's contention. It has been held that, if the consideration paid for a note is of the value of a peppercorn, it will support the note. If I sell, and deliver the thing sold, the value may not be material; but, if I fail to deliver part of the thing sold, and the nondelivery of that part renders the part which I do deliver valueless, the consideration fails. I must deliver the whole of the "peppercorn." If the mere promise to put the money in the treasury and furnish an indemnity bond is a sufficient consideration to entitle plaintiff to recover upon the notes, then, if A gives his note to B for $1,000, relying upon B's promise to send him the money the next day, and B never sends it, his *promise* to send it

would be sufficient to entitle him to recover on the note. This is not the law. Nor will it aid B in an attempt to recover upon the note that he is a man of large means, and that A could therefore recover the $1,000 from him in an action therefor. The consideration which defendant was to receive for the note has never been paid or furnished, and, if he is now compelled to pay the notes, the Iowa company will receive $18,500, plus interest, for nothing. It is interesting to note that the necessity for requiring an indemnity bond will appear from an examination of *International Mausoleum Co.* (under whom the Iowa company held its rights under the patents involved) *v. Sievert*, 197 Fed. 936, where the United States district court for the northern district of Ohio held one of the patents, under which the Iowa company was operating, viz., No. 858,070, void.

In the light of the views above expressed, the court did not err in giving instructions 6 and 7, covered by the second, third and fourth assignments. We are unable to discover any theory under the law, or in harmony with honesty and fair dealing, which would support any other judgment than that rendered.

AFFIRMED.

BARNES, ROSE and HAMER, JJ., not sitting.

DE FOREST D. JOHNSON ET AL., APPELLEES, V. HERMAN P. BUHMAN ET AL., APPELLANTS.

FILED APRIL 16, 1915. No. 18026.

Municipal Corporations: VACATION OF ALLEY. The syllabus in *Hart* v. *Village of Ainsworth*, 89 Neb. 418, re-examined and approved, and the law as therein announced *held* applicable to and decisive of this case.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Courtright & Sidner and *George W. Wertz,* for appellants.

William V. Allen and *William L. Dowling, contra.*

FAWCETT, J.

The controversy in this case is over a strip of ground 20 feet wide, running east and west in block 7, Railroad addition to the village of Leigh, bounded on the north by lots 1 to 6, inclusive, and on the south by lot 7, all in said block 7. The east end of the strip connects with Elm street, and the west end with an alley running north and south through the middle of the block. Plaintiffs instituted this suit in the district court for Colfax county to restrain the defendants Buhman, Hahn and Glandt, as trustees, defendant Lee, as village marshal, and defendant McMullen, as street commissioner, from trespassing upon the strip named, or in any manner interfering with plaintiffs in their exclusive possession thereof. From a judgment granting an injunction as prayed, defendants appeal.

Block 7 was platted July 2, 1886. Subsequently plaintiffs became the owners of the seven lots above referred to, through which the strip in controversy, designated on the plat as an alley, runs. Their contention is that the village never accepted the dedication of this alley, that the public never entered upon the use of it, but that at all times until 1909 the strip had been used by the owners of lots 1 to 7, inclusive, in connection therewith, as one entire body of land, and as such had been improved and built upon; that in June, 1909, the village authorities, by the performance of certain acts, specifically set out, attempted to take possession of and assume control over the strip, which attempt was resisted by plaintiffs; that in April, 1910, the plaintiffs duly executed and filed, in accordance with the provisions of statute, a deed vacating the plat, so far as it affected the seven lots and strip of land in controversy; that thereafter and until December, 1910, defendants desisted from further trespassing upon the

premises, and that plaintiffs restored their fences around the same, and otherwise repaired the injury which defendants had previously done; that on the last-named date defendants unlawfully broke and entered upon the premises, and forcibly removed the fences; and that, if not restrained, they will continue their attempts to open the strip of ground in question as an alley. This last allegation is admitted. The district court, at the close of the trial, June 5, 1912, took the case under advisement, and the parties were given leave to file briefs in support of their respective contentions. October 23 the court entered its findings that the strip of ground in controversy is the property of plaintiffs as owners of the lots adjoining and abutting thereon, that it is not and never has been any part of the public streets or alleys of the village, that neither the defendants nor their successors in office have any right to disturb or molest plaintiffs in the peaceable possession and occupancy of said strip, by trespassing thereon or threatening to open the same as a public street or alley, and perpetually enjoined defendants and their successors in office from so doing.

Defendants' principal contentions are that the deed of vacation was not operative, for the reason that it abridged and destroyed the rights and privileges of other proprietors in the plat; that it seeks to close and obstruct a highway laid out according to law; that it should have been signed by all the owners of the plat, and was not sufficient when signed by only the owners of the tract sought to be vacated. The evidence clearly sustains the judgment of the district court. It shows to our entire satisfaction that the vacation of this strip of land or alley did not in any manner abridge or destroy any of the rights or privileges of other proprietors in the plat. Conceding that the strip of land had been laid out as an alley by the original plat, the village officers and other proprietors within the plat had by their laches become estopped to claim any right to enter upon and take possession of this strip as an alley. For over 20 years after the filing of the plat they had stood by and seen plaintiffs and their grantors in possession

of and using this strip of land in connection with their lots on each side thereof as one tract, in a manner which clearly indicated an intention to hold possession by plaintiffs under a claim of ownership. Moreover, if plaintiffs had not inclosed and used this strip of ground prior to the time of filing their deed of vacation, and during all of those years the strip had been separated from plaintiffs' lots on the north and on the south by fences, but had never been used by the public nor any act done by the village authorities indicating an intention to open and use the same as an alley, the deed of vacation would have been effectual to vest in plaintiffs the absolute ownership of and control over the strip in question. *Hart v. Village of Ainsworth*, 89 Neb. 418.

We think further discussion is really unnecessary. First street and Short street on the south, Second street on the north, Main street on the west, Elm street on the east, and the alley running north and south through the middle of block 7, afford every proprietor of lots in block 7 access to his property.

We are unable to discover any theory upon which we would be justified in interfering with the judgment of the district court. It is therefore

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

STATE, EX REL. PETER O'SHEA, APPELLANT, V. FARMERS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED APRIL 16, 1915. No. 18880.

1. **Statutes**: CONSTRUCTION. A statute which is not uncertain or ambiguous will be construed according to its terms.

2. **Waters**: IRRIGATION CANALS: MAINTENANCE OF BRIDGES. Section 3438, Rev. St. 1913, which requires the owner, or those in control, of an irrigation ditch or canal to construct and maintain a bridge across the same, for the free and convenient use of the owner of lands lying on both sides of such ditch or canal, applies in all cases.

whether the owner owned it at the time the ditch or canal was built, or subsequently acquired by purchase tracts lying on different sides which together constitute one farm.

3. **Eminent Domain: WATERS: IRRIGATION CANALS: MAINTENANCE OF BRIDGES.** And such statute is not void as authorizing the taking of the property of the ditch company without compensation. The burden so imposed upon ditch companies constitutes a part of the consideration for the valuable right of eminent domain given to such companies by other provisions of the statute.

APPEAL from the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Reversed with directions.*

William Morrow, for appellant.

F. A. Wright and *J. G. Mothersead, contra.*

FAWCETT, J.

Relator is the owner of land in the south half of section 18, township 22, range 53, in Scott's Bluff county, which land is traversed by the irrigation canal of respondent. About 120 acres lie north and about 26 acres south of the canal. Relator brought this action in the district court for Scott's Bluff county to compel respondent to construct a bridge across the canal so as to connect the two tracts of land. From a judgment denying a writ and dismissing his action, he appeals.

The action is based on the provisions of section 3438, Rev. St. 1913, viz.: "Any person, company, corporation, or association constructing a ditch or canal through the lands of any person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any inclosed field." The case turns upon the construction to be given to the words

"in all cases" immediately following the semicolon. Does the requirement of the section, beginning with those words, relate to lands owned by one person and located on both sides of the ditch at the time the ditch was constructed, or does it relate as well to cases subsequently arising where one person becomes the owner of lands on both sides? In 1906 the Tri-State Land Company, being the then owner of the entire tract of land, constructed the irrigation canal through the same. In 1909 it sold the canal, together with the right of way, to the Farmers Mutual Canal Company. After the construction of the canal, and after the sale of the same to the Farmers Mutual Canal Company, the Tri-State Land Company sold the lands in controversy to relator; and at a still later date the Farmers Mutual Canal Company conveyed the canal and right of way to the respondent Farmers Irrigation District. It is contended by respondent, in support of the judgment of the district court, that, the canal having been built by the Tri-State Land Company while it owned the land, the canal was constructed through the lands of a corporation having an interest in the canal, and that, such being the fact, the land, by virtue of such interest in its owner at that time, was thereby excluded from the provisions of the statute, and, hence, the statute does not apply to the present case; that the statute does not apply where the canal is constructed over the land with the consent of the landowner, and does not apply to cases where the necessity for a bridge occurs at a time subsequent to the building of the canal. We are unable to concur in this construction. The statute is not ambiguous, and must therefore be construed according to its terms. It provides, first, the manner in which the ditch or canal shall be constructed, viz., "in a substantial manner so as to prevent damage to such land." This provision relates solely to the manner of construction. The words "through the lands of any person, company, or corporation" do not limit the statute to cases where the ditch cuts *through* the land of some individual owner, leaving land on both sides thereof. They apply as

well to lands abutting on a ditch. As to all such lands, as well as those actually penetrated or cut in two by a ditch, it must be constructed "in a substantial manner so as to prevent damage to such land." The statute then proceeds to say what shall be done so as to enable owners of lands on both sides of the ditch to have "the free and convenient use" of such lands, and provides that, where it is necessary for the free and convenient use of lands on both sides of the ditch, the owner of the ditch shall erect substantial and convenient bridges across its canal or ditch "in all cases." The words, "in all cases," mean precisely the same, whether they be used, as in the statute, immediately preceding the requirement for the construction of bridges, or immediately following such requirement. If the legislature had intended this requirement to relate only to conditions as they existed at the time the ditch was constructed, it would have been an easy matter to have said so. We see no difference between the rule which should be applied in construing this statute and that applied to the statute requiring railway companies to construct farm crossings across their roads. The principle involved is the same in each.

This question is fully and very ably discussed in *Quantock v. Missouri, K. & T. R. Co.*, 117 Mo. App. 469, where, in construing the section of the Missouri statute providing for farm crossings by railroads, it is held that the statute "was not intended to apply only to farms which the road divided by its original construction, but should apply where farming lands on both sides of the road are afterwards owned by a single proprietor." This decision was by the Kansas City court of appeals and being in conflict with a construction of the same statute by the St. Louis court of appeals in *Stumpe v. Missouri P. R. Co.*, 61 Mo. App. 357, the case was transferred to the supreme court for final determination. That court, in 197 Mo. 93, expressly disapproved the holding of the St. Louis court of appeals, and affirmed the holding of the Kansas City court. The syllabus reads: "The statute, requiring a railroad which cuts a farm in two to construct a crossing for the benefit of the

owner, applies in all cases where the farm lies on both sides of the railroad, whether the owner owned it at the time the railroad was built, or subsequently acquired by purchase tracts lying on different sides which together constitute one farm." The supreme court cuts its own opinion short, thus (p. 96): "We do not deem it necessary to enter upon a further discussion of this subject, because in the opinion of our Kansas City court of appeals, by Ellison, J., in this case, reported in 117 Mo. App. 469, everything is said that is necessary to be said, and we adopt that as our opinion." Emulating the example of the Missouri supreme court, we adopt the reasoning of Ellison, J., of the Kansas City court, as being applicable to the case at bar, and sound in principle.

Franklin County v. Wilt & Polly, 87 Neb. 132, strongly relied upon by respondent, does not sustain its contention. In that case the county sought to compel the respondents, who were the owners of a private mill, to construct a bridge over their mill race at a point on their private grounds where it was intersected by a public road laid out seven years after the construction of the mill race. That such a case is clearly distinguishable from the one at bar is shown by the language of Judge Root, as follows (p. 134): "There is nothing in the record to indicate that the mill to which the raceway is appurtenant is a toll mill, that any right exercised in operating it was acquired by the exercise of the right of eminent domain, or that the respondents' business is affected in any manner with a public interest."

It is next urged that, if the statute under consideration applies to a case like the one at bar, it is unconstitutional, for the reason that it is class legislation in that it does not apply to all waterways, but only to irrigation ditches, and *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1, is cited in support of the contention. We think counsel are in error. The cited case holds that section 58, art. II, ch. 93*a*, Comp. St. 1897, is void, but also holds that the section is not so intimately connected with the remainder of the act as to be incapable of separation from it, and

announces the oft-repeated rule that, when a separable part of a statute is adjudged to be null, the remainder continues in force, unless the unconstitutional part was an inducement to the adoption of the measure, which the opinion holds was not true in that case. Turning then to chapter 93*a*, *supra*, and eliminating from it section 58, thus held void, we find that section 51 is in the exact language of the section of the statute we are now considering, and under which the present action was instituted. We are unable to see how section 51, *supra*, is vulnerable to the holding made as to section 58.

It is next said that the section under consideration is void, for the reason that respondent is given no compensation for the taking of its property for the purpose of a bridge, and that it would take the property of respondent for private purposes. The answer to this contention is that the burden thus imposed upon a ditch company constitutes a part of the consideration for the valuable right of eminent domain given it by the statute. Without such right it could not build its ditch through a man's farm. Having accepted the right to build, regardless of the wish of the landowner, it must take that right burdened with the conditions imposed by the legislature. The question of the weight of the burden is one for the consideration of that body, and not for the court.

The judgment of the district court is reversed and the cause remanded, with directions to grant a peremptory writ of mandamus, as prayed in relator's petition.

REVERSED.

ROSE and SEDGWICK, JJ., not sitting.

G. A. ENOS ET AL., APPELLANTS, V. A. L. HANFF, APPELLEE.

FILED APRIL 16, 1915. No. 18195.

1. **Fraudulent Conveyances: LEASES FOR SALOON PURPOSES.** Section 2643, Rev. St. 1913, is not limited to conveyances to defraud creditors. It expressly provides that conveyances made to defraud creditors "or persons" are void. The language is broad enough, in the light of the common law, to include transfers made with the intent and purpose to evade the provision of the "Gibson act" (Laws 1907, ch. 82) forbidding the leasing of a building for saloon purposes by or from manufacturers of liquors.

2. ———: HUSBAND AND WIFE: CORPORATIONS. If a husband, who owns substantially all of the stock in a corporation, procures another corporation to be organized and substantially all of its stock to be issued to his wife, and thereupon the first corporation transfers its property to the new corporation, the transfer is equivalent to the transfer of property directly from husband to wife, within the meaning of section 2643, Rev. St. 1913.

3. ———: CORPORATIONS: DISSOLUTION. If such transfer is made for the purpose of enabling the first corporation, a brewing company, to continue to control buildings for the purpose of leasing them as saloons, the purpose would be illegal, and, if known by the stockholders of the new corporation, such corporation might be dissolved by *quo warranto*.

4. **Statutes:** CONSTRUCTION. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter." *United States v. Delaware & Hudson Co.*, 213 U. S. 366.

5. ———: ———: CONSTITUTIONAL LAW. While the legislature is not without power to enact a statute in the legitimate exercise of its police power, although it might result in injury to some private interest, it is also undoubtedly true that a statute, the purpose of which was primarily and principally the destruction of property, would violate our fundamental law, and we ought not to assume that in enacting such statute the legislature intended a construction which, although unnecessary to the furtherance of the main purpose of the statute, might result in the arbitrary confiscation of property, if the statute will admit of a more reasonable construction.

6. ———: ———: "GIBSON ACT." The so-called "Gibson act" (Laws 1907, ch 82) should not be construed so that it might result in the

unnecessary destruction of property values, if it is capable of other construction which would serve the purpose evidently aimed at.

7. ———: ———: FRAUDULENT CONVEYANCES. Questions of fraudulent conveyance of property are generally investigated by courts which are clothed with ample equity powers. They are usually complicated and difficult questions. This statute provides no adequate means of determining such complicated and important and far-reaching questions.

8. **Intoxicating Liquors**: LICENSE: POWER OF BOARD: FRAUDULENT CONVEYANCES. There is no direct provision in the statute requiring the licensing board to investigate such questions, or to refuse a license because of doubts in regard to the good faith of the title of the apparent owner of the property where the applicant expects to operate his saloon.

9. ———: ———: ———: ———. Under such circumstances, if the legislature had intended that such investigations must be made by this board, and that no license should be issued where the licensing board should find that there was fraud or other infirmity in the title of the party from whom the applicant proposed to lease when that title appeared to be fair and regular upon the record, it seems probable that the legislature would not have left such intention in doubt. It is a more reasonable construction of this statute that the intention was to leave such inquiries to the ordinary process of the law.

10. **Municipal Corporations**: POWER OF MAYOR: DECIDING VOTE. The mayor of a city of the second class having less than 5,000 inhabitants may cast the deciding vote when the council is equally divided.

11. **Intoxicating Liquors**: LOCATION OF SALOON: DISCRETION OF BOARD. It is confided to the discretion of the city council to determine the location of a saloon licensed by the council.

12. ———: BOND: REMONSTRANCE: BURDEN OF PROOF. If, upon application for saloon license, the remonstrants allege that the surety company executing the bond tendered was not licensed to do business in this state, or that becoming such surety was not within the powers of such bonding company, the burden is upon them to make such proof.

13. ———: LICENSE: CHARACTER OF APPLICANT: EVIDENCE. The fact that the applicant for license declines to answer incriminating questions is not conclusive that he is not a man of respectable character and standing. The evidence in this case establishes that the applicant is qualified.

14. ———: ———: FORCE OF ORDER. The order of the licensing board granting the license is not an ordinance as defined in section 5227,

Rev. St. 1913. It does not have "the force and effect of law." The provision of section 5237, Rev. St. 1913, that "no ordinance for the government of any city * * * shall go into effect until thirty days after the passage of the same" does not apply.

15. ———: ———: ORDINANCE: INITIATIVE AND REFERENDUM. An ordinance regulating the licensing of the sale of liquors must be enacted before such license can be granted, and the adoption or rejection of such an ordinance is within the initiative and referendum act.

16. **Municipal Corporations**: INITIATIVE AND REFERENDUM ACT: VALIDITY. The initiative and referendum act of 1897 (Laws 1897, ch. 32) is not invalid as an attempt to regulate the administration of the affairs of cities and other municipalities.

17. **Statutes**: CONSTRUCTION. If section 10 of the act (Laws 1897, ch. 32) is incapable of a construction in harmony with section 22, art. I of the Constitution, which we do not decide, it may be disregarded without invalidating the whole act.

Rehearing of case reported in 95 Neb. 184. *Former judgment of reversal vacated, and judgment of district court affirmed.*

Smyth, Smith & Schall appeared on rehearing as additional counsel, *amici curiæ.*

SEDGWICK, J.

After our former opinion in this case (95 Neb. 184), a reargument was ordered upon the following propositions: First, Who has the burden of proof as to the good faith of the organization of the realty company and Mrs. Storz' ownership of the stock? Second, Is the question involved in this case analogous to a transfer between relatives when creditors are interested? Additional briefs have been presented and argument had upon these propositions both in behalf of the parties themselves and in behalf of the Independent Realty Company. The facts necessary to an understanding of the questions presented are sufficiently stated in our former opinion.

It is suggested that the statute of frauds (Rev. St. 1913, sec. 2643), relates only to transfers to defraud creditors. The statutes of the different states vary considerably in the terms used. They are, of course, suggested by, if not mod-

eled upon, the English statute of 13 Elizabeth, ch. 5. That act made any conveyance of lands or personal property "devised and contrived of malice, fraud, covin, collusion or guile * * * to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs * * * clearly and utterly void, frustrate and of none effect." Some of the statutes of the different states are expressly limited to conveyances to defraud creditors. Others are limited to conveyances to defraud creditors or purchasers. Ours follows more nearly the English act and the statute of New York, which include conveyances to hinder, delay, or defraud creditors or other persons. The words "or persons" are in our statute, so that our statute is not limited to creditors only. The statute, however, "is merely declaratory of the common law. * * * The principles of the common law, as now understood, are so strong against fraud in every shape that they will attain every end proposed by the statute. * * * As the act is merely declaratory, resort may always be had to the principles of the common law whenever the statute fails to reach a case of fraud. * * * The common law supplements the statute, to the end that justice may be done and every species of fraud suppressed." Bump, Fraudulent Conveyances (4th ed.) pp. 8, 9.

The transaction in this case, conveying this property to the corporation and issuing substantially all of the stock in the new corporation to Mrs. Storz when Mr. Storz himself held substantially all of the stock in the other corporation, would be regarded in an action by creditors of Mr. Storz to subject this stock to the payment of his debts as though his stock held in the name of Mr. Storz had been by him transferred to his wife. This precise point was decided by this court in *Lusk v. Riggs,* 65 Neb. 258, 70 Neb. 713. If this transaction was intended to result in delaying creditors of the Storz Brewing Company and Mrs. Storz took the stock with knowledge of that fact, there is of course no doubt that it would be held to be void as against such creditors.

Many decisions of this court are cited as holding that "the rule that the burden of proof is upon the wife to sustain her title where property is transferred to her by her husband applies only where the rights of creditors are affected." The earliest case cited is *German Ins. Co. v. Hyman*, 34 Neb. 704, in which Judge Post states the law correctly as follows: "A gift to a married woman by her husband of money or property is valid except as against the creditors of the latter and those having the equities of creditors." This decision has nothing to do with the above proposition contended for. It decides merely that the property itself passes to the donee, under the conditions named, and that only creditors of the donee and *those having the equities of creditors* can claim the property. It contains no intimation as to who has the burden of proof when it is asserted that the conveyance was made to defeat the established policy of the state. In *Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622, *Lavigne v. Tobin*, 52 Neb. 686, and *Boldt v. First Nat. Bank*, 59 Neb. 283, the question was whether a gift from husband to wife before he had incurred or contemplated any indebtedness was valid as against claims of creditors for liabilities afterwards incurred. In *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, 910, the point involved is stated in the opinion: "If made to defraud the creditors of the grantor, the instrument (deed from husband to wife) would be valid as between the parties, and a court of equity would not lend itself to grant relief to the parties from the consequence of their fraudulent acts. This could only be accomplished by the creditors of the grantor who were such at the time of the making of such fraudulent conveyances." In *Doane v. Dunham*, 64 Neb. 135, and *Van Etten v. Passumpsic Savings Bank*, 79 Neb. 632, it was decided that a deed from husband to wife without consideration will be presumed to be a gift as against the claim of a resulting trust from the grantor to his heirs. The question raised here was not presented or considered in any of these cases.

If the Storz Brewing Company organized or promoted this company and transferred this property for the purpose

of enabling the brewing company to continue to control these properties for the purpose of leasing them as saloons, there can be no doubt that the company so formed would be for an illegal purpose and might be dissolved by *quo warranto*. It is not necessary to consider here what evidence would be necessary in such an action to justify the dissolution of the corporation. The question is whether the Gibson act (Laws 1907, ch. 82) controls the license board and prevents the granting of a license to be used in a building owned by the Independent Realty Company. In *United States v. Delaware & Hudson Co.*, 213 U. S., 366, the supreme court of the United States construed the "commodities clause" of the Hepburn act. The clause provided: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." The court, by the present Chief Justice, said: "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which

such questions are avoided, our duty is to adopt the latter." It was contended in that case that "the commodities clause is unconstitutional because its penalties are so prescribed as practically to amount to a denial of an opportunity by railroad companies to obtain a judicial determination of the questions involved," and that "even if abstractly considered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the fifth amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of the property which the corporations possessed and had long enjoyed under the sanction of valid state laws." The court quoted from the opinion of the lower court: "The general situation is that for a half century or more it has been the policy of the state of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to market in Pennsylvania and other states. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania; one of them three-quarters of a century ago and the other half a century ago, for the express purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and other states. It is not questioned that, pursuant to this general policy, investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different states of the Union and Canada for the year of 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was

transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other states and Canada, and of this four-fifths, from 70 to 75 per cent. was produced either directly by the defendant companies or through the agency of their subsidiary coal companies. It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the state of Pennsylvania, and that their right to enjoyment of the same has never been doubted or questioned by the courts or people of that commonwealth, but has been fully recognized and protected by both."

The court then stated some of the constitutional questions which might arise from the foregoing considerations, and did not find it necessary to determine them. Two of the constitutional questions that necessarily arose from the construction and application of the statute are then stated by the court and thought to be of such importance as to require the court to so construe the statute, if possible, as to avoid such constitutional questions. We think that similar considerations require us to examine the statute in question very closely in ascertaining the intention of the legislature. It will be seen from the facts stated in our former opinion that the question is of far-reaching importance to the Independent Realty Company. These properties in different parts of the state, valued at several hundred thousands of dollars, were, before the enactment of this statute, rented to saloon keepers, and saloons were being operated in them. They were in many instances constructed for that purpose and were not adapted to any other. The statute was in force within 90 days after it was enacted, and imposed very severe penalties upon the

brewing company if it leased these properties for saloon purposes, and also imposed very severe penalties upon the saloon keeper if he leased a building for saloon purposes from the brewing company. It is, of course, true that the legislature is not without power to enact a statute in the legitimate exercise of its police power, although it might result in injury to some private interest; but it is also undoubtedly true that a statute, the purpose of which was primarily and principally the destruction of property, would violate our fundamental law, and we ought not to assume that, in enacting a statute in the legitimate exercise of police power, the legislature has intended a construction which, although unnecessary to the furtherance of the main purpose of the statute, might result in the arbitrary confiscation of property. We ought not, therefore, to give this statute such a construction as might result in the unnecessary destruction of property values, if it is capable of other construction which would serve the purpose evidently aimed at.

Section 5 of the act (Laws 1907, ch. 82) makes it unlawful for any person "to lease, occupy or use * * * any building * * * owned or controlled by any * * * corporation * * * engaged in the manufacture" of liquors. The Independent Realty Company was not engaged in the manufacture of liquors. Whatever may have been the motives of those in control of the Storz Brewing Company in organizing the Independent Realty Company and transferring property, it does not necessarily follow that this applicant participated in those motives. He apparently had no means of knowing as to the organization of these companies and what the motives of their promoters may have been. Questions of fraudulent conveyance of property are generally investigated by courts which are clothed with ample equity powers. They are usually complicated and difficult questions. The construction of the statute contended for by the remonstrants would imply that the legislature intended that the applicant for saloon license must determine the question of the good faith of the organizers of these companies at his peril, and, if he made a

mistake in that regard, would subject himself to a penalty of from $1,000 to $10,000. This statute provides no adequate means of determining such complicated and important and far-reaching questions. The licensing board is an administrative body. Their hearings are informal. They are not supposed to be familiar with legal proceedings or the rules of evidence. Their investigation of such questions must necessarily be inadequate and superficial. If they admit incompetent evidence, it may be disregarded upon appeal, but their rulings upon the exclusion of evidence are final; no further evidence is taken by the court upon appeal. The district court determines the matter upon the record made and the evidence taken by the licensing board, and, when the case comes to this court, we are likewise limited. Such an investigation is generally imperfect and incomplete. The court not having all of the facts before it, it would be unable to determine the truth of the matter, and its conclusion might be unjust. There is no direct provision in the statute requiring the licensing board to investigate such questions, or to refuse a license because of doubts in regard to the good faith of the title of the apparent owner of the property where the applicant expects to operate his saloon. Under such circumstances, if the legislature had intended that such investigations must be made by this board, and that no license should be issued where the licensing board should find that there was fraud or other infirmity in the title of the party from whom the applicant proposed to lease when that title appeared to be fair and regular upon the record, it seems probable that the legislature would not have left such intention in doubt. We think that it is a more reasonable construction of this statute that the intention was to leave such inquiries to the ordinary process of the law. The licensing board may exercise its discretion, and is not required to grant a license if a doubt is entertained as to the good faith in the proceedings in any respect. On the other hand, it seems clear that the legislature never intended that the licensing board should be compelled to enter upon such investigations as are suggested by this objection.

Having reached the conclusion that the judgment of the district court ought not to be reversed for the reason formerly given, we proceed to an examination of the other grounds urged for reversal. It is objected that the mayor did not possess power to cast the deciding vote when the council was equally divided, and therefore no license has been legally granted to defendant. *Rohrer v. Hastings Brewing Co.,* 83 Neb. 111, is conclusive against remonstrants upon this point. It also disposes of assignment No. 2.

The objection that the "location of this saloon building in the city of Stanton in itself was such as, considered with reference to the business, constituted a business nuisance" is answered in *Fraser v. Hunter,* 96 Neb. 134, where it was held: "The determination of the locality in which a saloon may be conducted is one which is committed to the good judgment of the licensing body, and not to the discretion of the courts."

It is objected that "no proper liquor bond appears to have been offered to and approved by the mayor and council." It will be seen that the objection is not that no liquor bond was offered and approved, but that no "proper" bond was offered. It is conceded that a bond was tendered, signed by the American Surety Company, and the real contention seems to be: First, that the applicant did not furnish proof that executing saloon keepers' bonds was within the powers conferred upon the company by its charter; and, second, that it is not shown that the surety company is authorized to do business in the state of Nebraska. In *Lambert v. Stevens,* 29 Neb. 283, 287, it was said: "When the remonstrance denies any matter necessary to confer jurisdiction upon the granting power, as that certain signers to the petition are freeholders, the burden is on the applicant to establish that they are qualified petitioners. Where the remonstrance sets up new matter, such as that certain signers to the petition were made freeholders for the purpose of signing the same, or that the applicant has been guilty of a violation of any provisions of the liquor law within a year, or that any former license

has been revoked, the burden is upon the remonstrators to establish such new matter." It follows that the burden was upon the remonstrants to establish the facts which they now urge for the rejection of this bond.

The applicant was questioned in regard to violation of the law by him and declined to answer. It is argued from this that he has conceded that he was not a man of good moral character, but this conclusion does not follow. The evidence shows that the applicant had never engaged in the saloon business prior to the time of making this application; that he was 59 years old, was a retired farmer, had resided in Stanton county since 1874, and had held the offices of precinct assessor and county assessor of Stanton county. At the hearing he introduced as witnesses the county judge of the county, who had known him since 1906, Chris Selle, who had known him for 40 years, and H. D. Miller, vice-president of the First National Bank of Stanton, who had known him for 20 years, all of whom testified as to his good character and standing in the community. It is clear that this assignment is without merit. *Shank v. Lee*, 90 Neb. 732; *In re Phillips*, 93 Neb. 152.

It is urged that, assuming that ordinance No. 94 and the law of 1897, under which it was passed, are valid and all proceedings of the mayor and council "up to and including the adoption of the order granting license in this case, still, under the plain provision of the 'Act of 1897,' the action of the council directing that the license issue and the action of the district court directing that the license issue 'forthwith' were both premature and erroneous." The order of the licensing board granting the license is not an ordinance as defined in sec. 5227, Rev. St. 1913. It does not have "the force and effect of law." The provision of section 5237, Rev. St. 1913, that "no ordinance for the government of any city * * * shall go into effect until thirty days after the passage of the same" does not apply. An ordinance regulating the licensing of the sale of liquors must be enacted before such license can be granted, and the adoption or rejection of such an ordinance is within the initiative and referendum act.

The initiative and referendum act of 1897 is not invalid as an attempt to regulate the administration of the affairs of cities and other municipalities. It provides for the reference to the voters of such measures as the legislative authorities of such municipalities have power to "give the force and effect of law." It does not violate section 11, art. III of the Constitution, nor that provision of the federal Constitution that guarantees to the people representative form of government.

If section 10 of the act (Laws 1897, ch. 32) is incapable of a construction in harmony with section 22, art I of the Constitution, which we do not decide, it may be disregarded without invalidating the whole act.

Our former judgment is vacated, and the judgment of the district court is

AFFIRMED.

BARNES, J., concurring.

It is stated in the majority opinion, in substance, that we ought not to assume that, in enacting the so-called Gibson act, the legislature intended that it should be so construed as to result in the confiscation of the vast amount of property which at one time was owned by the brewing company, if such construction can reasonably be avoided. As I understand the question, such would be the effect of the act if we should hold that the licensing board had the power and was required to determine the rights of the Independent Realty Company to own, hold and control such real estate. This question is a judicial one, and should be determined by a court of equity in a case brought directly for that purpose, and in which the Independent Realty Company is a party. This question should not be decided by an administrative body, such as a city council or village board. It is shown by the record that the title to the realty once owned by the Storz Brewing Company is now of record in the Independent Realty Company. It is regular and fair upon its face. Its title has not been assailed by the state in any proceeding in a court having jurisdiction to determine the *bona fides* of its title. As I under-

stand the question, the title of the realty company should not be determined by an administrative body upon the mere suggestion that the property still belongs to the brewing company. This question cannot properly be disposed of by saying that the statute is so plain that a village board or city council is bound to refuse a license to sell malt, spirituous or vinous liquors to an applicant, upon the suggestion that the building in which the applicant proposes to conduct his business is owned and controlled by a brewing company, in a proceeding to which the owner of the title is not a party. It is not a proper disposition of this far-reaching and important question to say that the statute is too plain for misinterpretation or misconstruction. The question should be determined in an action for that purpose, brought in a court competent to determine it, and its judgment should be such that a licensing board would have no difficulty in following the rule announced by the court. Otherwise we might have the good faith of the Independent Realty Company's title upheld in one village and denied in others.

I therefore concur in the majority opinion.

ROSE, J., dissenting.

The controlling question presented by the record is very simple, and its proper solution is free from difficulty. Can a village board issue a valid license authorizing the sale of intoxicating liquors in a building controlled by a manufacturer of beer? The statute says, "No," in language too plain for misinterpretation or misconstruction. Rev. St. 1913, sec. 3892. The power of the legislature to pass such a law and to make it applicable to present owners of property devoted to saloon purposes has been affirmed by the supreme court of the United States as follows: "Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented, or other intoxicating liquors, to be used as a beverage, may be enforced against persons who, at the time, happen to own property whose chief value consists in its fitness for such

manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments." *Mugler v. Kansas,* 123 U. S. 623.

The arm of sovereignty created by law to withhold from an applicant a license to sell intoxicating liquors in a building controlled by a manufacturer of beer is the licensing board. Contrary to the pronouncement of the majority, the legislature has in unmistakable terms clothed that board with the machinery and the power to investigate and determine whether a proposed site for a saloon is owned or controlled by a brewer. If the licensing board makes a mistake in exercising such authority, the courts may correct it by means of an appeal. Rev. St. 1913, ch. 40. In the present case, under rules of evidence recognized by the courts of Christendom, it is shown that the licensing board, in violation of law, granted an illegal license to conduct a saloon in a building controlled by a manufacturer of beer. The legislature had power to authorize the licensing board to investigate and determine the ownership or control of a building for the purpose of granting or refusing a saloonkeeper's license. In passing upon the sufficiency of a petition for a license to sell intoxicating liquors, the licensing boards, under legislative power recognized by this court, have, for many years, investigated and passed upon the petitioner's title to real estate. Administrative bodies like the county board, the state board of irrigation and the state railway commission are now performing duties which affect property rights. The former judgment pronounced by this court would enforce the statute as written. The evidence is correctly stated and the law is properly applied in the first opinion. The license was canceled according to both the spirit and the letter of the statute. *Enos v. Hanff,* 95 Neb. 184. For these reasons, I adhere to the former decision, and dissent from that of the majority.

LETTON, J., concurs in this dissent.

FRED GRIMM ET AL., APPELLEES, V. ELKHORN VALLEY DRAINAGE DISTRICT, APPELLANT.

FILED APRIL 16, 1915. No. 17943.

1. **Eminent Domain: AWARD: AFFIRMANCE.** Where a drainage district was established, and the commissioners appointed by the county court condemned the land sought to be taken for the purpose of the ditch, and determined its value as appropriated, and to what extent the remainder of the land of the appellees was damaged by the taking of the strip and the putting in of the ditch, and assessed the damages sustained at $600, and subsequently, on an appeal to the district court, the jury assessed the damages at $3,310.63, and judgment was rendered on such verdict, such verdict and judgment will be allowed to stand, unless it is shown that they are clearly wrong.
2. ———: CONDEMNATION PROCEEDINGS: DRAINAGE. The irrigation of arid lands, the straightening of water courses, and the drainage of swamp and overflowed lands are subjects of public concern, not to be condemned by the courts, where the constitution and the legislature have provided that the acts contemplated may be done.
3. **Evidence** examined, and *held* to sustain the verdict.
4. **Eminent Domain: TRIAL: INSTRUCTIONS.** The request for instructions refused and the instructions given, examined in the body of the opinion, and *held* to be without prejudice.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Courtright & Sidner, for appellant.

Myron L. Learned, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Douglas county. The petitioner, the Elkhorn Valley Drainage District, in August, 1909, filed a petition in the county court of Douglas county seeking to condemn certain land within the limits of the said drainage district, and on November 24, 1909, filed a supplemental petition alleging that the defendants were the owners of the south-

west quarter of the northeast quarter, the south half of the northwest quarter, the north half of the southwest quarter, and the southeast quarter of the southwest quarter, all in section 23, township 15, range 10, Douglas county, Nebraska. The defendants became the owner of this land in 1904 or 1905 through the death of their uncle. The petitioner is a corporation organized under the provisions of ch. 153, Laws 1907, and later laws amendatory thereof and supplemental thereto for the purpose of draining lands, etc., within a certain drainage district of which the lands of the defendants is a part. The petition alleges that the corporation is organized under the law above referred to and other laws amendatory thereof and supplemental thereto, and alleges that it is authorized under and by virtue of said laws to locate, construct, excavate and maintain a system of drainage within the said district, and to take and appropriate real estate by the right of eminent domain for the purposes of said drainage district and for the purpose of locating, constructing, excavating and maintaining such system of drainage.

It is further alleged in the petition that the Elkhorn Valley Drainage District embraces territory in Douglas and Sarpy counties, Nebraska, and that it is bounded on the north by the north line of Douglas county, on the west by the Platte river, and on the east and south by certain lines attempted to be shown by certain blue prints filed in connection with the petition marked exhibits A, B, C, D, E and F, and made a part of the petition. The petition alleges that, in furtherance of the projects of the petitioner and appellant, the appellant found it necessary to take a strip of land 100 feet wide on each side of the center line of a ditch to be constructed as then surveyed, and extending across from the east line to the south line of the said southeast quarter of the southwest quarter, and that said ditch would contain about 4.2 acres. The land of the appellees affected and damaged by the putting in of the ditch lies in the east half of the southwest quarter of said section 23, most of the land so affected being in the southeast quarter of the southwest quarter. The ditch leaves the

river in the northeast quarter of the northeast quarter of section 26, on land belonging to C. F. Backhus, and runs northeasterly across the southeast corner of the southeast quarter of the southwest quarter of section 23, belonging to the defendants, and thence onto and through land belonging to James B. Rodgers, until it strikes the river near the center of the northwest quarter of the southeast quarter of said section 23.

Two of the appellees have lived on the land for several years, their house being on the southeast quarter of the northwest quarter of section 23. They got at that part of their land lying on the east or south side of the Elkhorn river by crossing a bridge northeast of their houses, and thence continued northeasterly on the road to a point where it intersected a road running south and thence south along that road until they got to the southwest quarter of the southeast quarter of section 23, which belonged to James B. Rodgers, and thence across that land over a roadway which had been used for 35 or 40 years to their own land.

The commissioners appointed by the county court under the petition for condemnation made an award condemning the land sought to be taken and allowing $600 damages, from which award the appellees appealed to the district court.

The issues involved were: What was the value of the strip of land appropriated by the appellant? And to what extent was the remainder of the land of the appellees damaged by the taking of the strip and the putting in of the ditch? There was a trial to a jury in the district court, and this jury, under the supervision of the court, inspected the land and its surroundings at the request of the appellant. After making this inspection, listening to the evidence and the instructions of the court, the jury returned a verdict for appellees for $3,310.63.

The first assignment of error alleged by appellant is: "The court erred in giving instruction No. 7 on its own motion with reference to a road across the Rodgers land." The instruction complained of reads: "As bearing upon

the question of the value of the land, testimony was introduced as to the means of access to the land over a road running through the Rodgers' land. In this connection you are instructed that, if you believe that for a period of ten years immediately preceding the construction of the ditch the plaintiffs and others having occasion to use the road were permitted by Mr. Rodgers to use the road in question without objection or protest for the full period of ten years, such usage by plaintiffs and others would create an easement or right of way across the Rodgers land."

There is also a second assignment, which may be considered along with the first. It is that the court erred in refusing to give instruction No. 3, asked by appellant, with reference to a right to travel across the Rodgers land. It reads as follows: "You are instructed that the plaintiffs Grimm had no legal right to travel across the Rodgers land for any time in the future, and that their prevention from travel across the Rodgers land by the digging of the cut-off ditch is not to be considered by you as an element of damage to them."

Adolph Grimm, one of the appellees, testified that he understood that the appellees had a legal right to travel the road across the Rodgers land; that it had been traveled for the last 30 or 40 years; that Mr. Rodgers had a piece of land on the north side of the river, and that the appellee testifying always considered he had a legal right to go over their land to get to his land. Mr. Courtright, for the petitioner, asked the witness, Adolph Grimm: "Q. Then, as a matter of fact, in the working of this land in the past, and before the drainage ditch was dug, you went from your home around on the highway northeast, and then in a southerly direction, and then went across the Rodgers land, just crossing it because he permitted you to do so, and made no objection—is that it? A. I understand that we have a legal right to travel this road, and it has been traveled for the last 30 years—30 or 40 years; and, another thing, he has a piece of land on the north side of the river, and we always considered it a legal right for

him to go through our land to get to his land." Mr. Courtright then said to the witness: "Q. Tell us on what you base your opinion." And the witness answered: "For the simple fact that there never was any objection to it; and another thing, Mr. Rodgers himself, while I was on the farm, gave me notice to come and help to work the road and maintain it down this hill." He then testified that nearly every year they fixed up the road; that during all the time they traveled the same course; that last year four of them worked half a day; that pretty nearly every year they farmed the land they fixed the road; that the uncle of the witness and the people who rented the land in controversy from his uncle had gone over the road across the Rodgers land for 30 or 40 years; that Mr. Rodgers never made any objection to him or to any one else, so far as he knew; that no objection was ever made to Rodgers going across the land of the appellees; that other people used the road going across Rodgers land, and had for many years, to get to land which they owned on that side of the river; that they helped to maintain and repair the road.

Fred Grimm, one of the appellees, testified that he went down the road across Rodgers land while working for his uncle in 1884; that it had been used every year since then; that he understood that it had been used four to six years before 1884.

Earnest Grimm, one of the appellees, testified that he had known the road across the Rodgers land since 1895; that people had been going over that road to get to the land in controversy during all the years since 1895; that it was used for many years prior to 1895 as he understood it.

The evidence shows that the appellees and their grantor had used the road across Mr. Rodgers' land under a claim of right and without objection or protest on his part for more than ten years. In *Majerus v. Barton*, 92 Neb. 685, this court held: "Where there has been an open, visible, continuous and unmolested use of a roadway across the premises of another for a period exceeding ten years, it

will be presumed to be under a claim of right, and not by the license of the owner; and, where one seeks to close a way over his land which has been enjoyed by his neighbor for such period, he has the burden of showing that the use was permissive, and not under a claim of right, and, if he fails to overcome such presumption by a preponderance of the evidence, his case must fail."

It would not seem that the appellant should be permitted to question the right of continuation of the use which had existed for 30 or 40 years, as the evidence shows.

The third assignment of error is that the court erred in refusing to give instruction No. 1, which is as follows: "You are instructed that the fact that there is a section line at the south side of the land involved in this action is wholly immaterial, and not to be considered by you in any way."

Adolph Grimm, one of the appellees, testified that he had walked the section line from the public highway west to the ditch; that the section line is between 200 and 300 feet south of where you leave the highway to take the road through the Rodgers land; that the natural contour of the land along the section line is practically the same as on the Rodgers land; that just as good a road or better could be put in on the section line as the road on Mr. Rodgers' land. We think the proximity of a section line over which a road might be located was proper for the jury to consider in connection with the question of the accessibility of the land involved.

The fourth assignment of error is that the court erred in giving instruction No. 1, requested by the plaintiffs, as follows: "You are instructed that all the damages which the plaintiffs sustained by reason of the condemnation of the 200-foot strip, and any and all damages which the adjoining land of the plaintiffs sustained by reason of the taking of the 200-foot strip, based on a proper use of the tract so condemned, should be allowed in this case, under the specific instructions heretofore given you by the court. In other words, the plaintiffs cannot bring another action for damages based on the taking of the 200-foot strip and

damages to adjoining land, unless it be that the strip of land condemned is used in an improper and illegal manner." We are unable to discover any prejudicial error in the instruction quoted.

In connection with the above alleged error, it is insisted that the affidavit of Mr. Courtright, of counsel for the petitioner, should be considered. Mr. Courtright's affidavit attempts to allege prejudicial conduct on the part of the attorney for the appellees. It states that Mr. Courtright was the attorney for the petitioner in the trial held in the district court, and that in the closing argument the attorney for the appellees "repeatedly stated that the drainage district had been three years in diverting the Elkhorn river into the cut-off ditch; that it had not yet succeeded; that as yet it was at the most only a theory; that it was doubtful if the water ever would be diverted; that the land was taken by the defendant without the consent of the plaintiffs, and that all doubts in the case should be resolved in favor of the plaintiffs; and that no subsequent action could be brought for any damages if the water never was diverted; and that if the jury did not find for the plaintiffs for the full value of the 44-acre tract, and the district never did divert the water into the cut-off ditch, the plaintiffs would lose without hope or possibility of future recovery."

It is not shown by the record that any objection was made to the argument of Mr. Learned. If Mr. Courtright desired to avail himself of his contention, he should have made an objection then, and the matter should have been ruled upon by the court.

The fifth assignment of error reads: "The court erred in refusing to give instruction No. 4, asked by defendant, as follows: 'You are instructed that it is the legal duty of the defendant to in good faith proceed with all reasonable expedition and to use all reasonable methods to wholly divert the channel and water of the Elkhorn river from its present channel into the cut-off across the land of the plaintiffs.'" It is not clear how the refusal to give this instruction was prejudicial to the drainage district.

The good faith of the appellant in proceeding with expedition to divert the channel would certainly not relieve it from any legal liability incurred.

The sixth assignment of error reads: "The court erred in refusing to give instruction No. 8, asked by defendant, as follows: 'You are instructed that it is the legal duty of a party suffering or about to suffer injury or damage at the hands of another, for which that other may be liable, to use all reasonable effort to make the injury or damage as small as possible, and that a party may not needlessly abandon property or the use of it and recover the damage caused by such abandonment from another.'"

Our attention is not called to the evidence which is claimed to sustain and justify this contention. In the comments of counsel for appellant on this question they say: "It was undisputed in the proof that for some years pending these court proceedings, and before the trial, the landowners had allowed the 44-acre tract to remain idle. The drainage district contended that it could have been and should have been used, and that it was allowed to remain idle for the sole purpose of influencing the jury which might try this case in increasing the amount of the damage. They could have used a ferry to advantage." Counsel for appellant said: "The failure to give this instruction shows that the scheme was successful. There was abundance of proof that it (the land) could have been used, and that they had an offer from the president of the drainage district to rent it at $4 an acre cash rent for two years, which they refused. * * * They claimed, however, that this offer was simply a bluff, and not made in good faith. The president said it was made in good faith." If it was contended before the jury and the court that this offer of $4 was only a "bluff," and the jury found against the appellant on that fact, then it is the end of that controversy. It was for the jury to determine.

The seventh assignment of error is: "The court erred in giving instruction No. 10, on its own motion, relating to interest, as follows: 'You are instructed that while this appeal has been pending there has been paid to the

plaintiffs by the defendant $600 on Oct. 16, 1911. If you find that plaintiffs' damages did not exceed this sum, then your verdict should be that plaintiffs' damages have been fully paid, and you should find for the defendant. If you find that the damages exceed $600 then you should return a verdict for plaintiffs for such sum in excess of $600, on which you should compute interest at 7 per cent. from December 23, 1909, to the present time, and, in addition thereto, interest on $600 at 7 per cent. from December 23, 1909, to October 16, 1911, the date on which the $600 was paid to plaintiffs, and return a verdict for plaintiffs for such sum.' "

If the appellees were entitled to interest, then there was no error in giving the instruction complained of. In *Chicago, R. I. & P. R. Co. v. Buel,* 56 Neb. 205, this court held: "Where, on an appeal from an award of damages for land taken for right of way purposes, the damages are found to exceed the award of the commissioners, it is proper to instruct the jury to allow interest from the time of the condemnation at the rate of 7 per cent. interest per annum." We think the principle laid down in the case cited is applicable to the instant case. In *Nemaha Valley Drainage District v. Marconnit,* 90 Neb. 514, this court held: "In the taking or damaging of private property by a drainage district corporation in carrying out the purposes of its organization, the same principles apply as to the ascertainment of damages as in the exercise of the right of eminent domain for the location of a highway, the construction of a railroad, or like instances where private property is taken or damaged for public use." The appellees appear to have been entitled to the application of this rule, and also entitled to interest upon the damages sustained. We see no error in that assignment.

The eighth assignment of error reads: "The court erred in overruling defendant's motion for a new trial." It is claimed that the verdict was excessive and unconscionable.

George L. Campen, called as a witness for the appellees, testified that out of the land of the appellees on the

east side of the river the ditch took 4.28 acres; that 1.83 acres are on the east side of the ditch; that there were 14½ acres of timber, and 26.74 acres of corn land.

Adolph Grimm testified that the land had been in corn before the appellee got it; that it was better than the high land for corn, and usually yielded 5 to 10 bushels an acre more corn than the high land did; that the timber land was mostly in ash, running from 8 to 12 inches in thickness; that a team hitched to a wagon could not be driven across the ditch; that the sides of the ditch were from 16 to 14 feet high; that the ditch was from 25 to 40 feet wide at the top; that at the bottom it ran down to a point only a few inches wide; that the fair market value of the appellees' land on the east side of the river before the ditch was put in was $100 an acre; that the old river bed was at times so that they could not drive a team across it; that the old river bed was usually overflowed in the spring; that sometimes the water would stand two or three months.

D. L. Hopper testified that the land in controversy was a rich soil and would produce about one-third more than upland; that prior to putting in the ditch the land in controversy, except the timber land, was worth $100 an acre, and the timber land $85 or $90 an acre; that after the ditch was put in the land was worthless, because you could not get at it.

John Burt testified that the land in dispute would produce from 10 to 15 bushels an acre more than the upland; that it was not safe to ford the river with a team; that the river had only frozen over once in ten years so that it would be safe to cross it with a team; that a farm wagon could not be driven across the ditch; that the fair market value of the land, outside of the timber, was $100 an acre, and that the timber was worth $85 to $90 an acre; that after the ditch was put in the land was practically worth nothing; that the two-acre tract east of the ditch was of no value, because it was too small for practical purposes, taking into consideration the fact that the appellees had to go away around to get at it.

Fred Grimm testified that the value of the land was $100 an acre before the ditch was put in, except the timber land, which was worth $90 an acre; that after the ditch went in the land was not worth anything; that the value of the two-acre tract east of the ditch was $20 an acre; that the land in controversy before the ditch was put in got the benefit of the silt that was drained from the upland every year, and was enriched thereby; that Compton never made appellees an offer of $4 an acre for the use of the land.

Ernest Grimm testified that the value of the land before the ditch was put in was $100 an acre; that the Elkhorn river goes out of its banks in the spring and fills the old cut-off, and the water remains there six or eight weeks, and during that time it is not safe to drive across it; that there is also a June rise, and the water fills the cut-off then and stays a long time before it seeps away, and during that time you cannot drive across; that after the ditch was put in the land was worth only from $5 to $10 an acre.

This court has held that when the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong. *Davis v. Clark,* 94 Neb. 573; *Cushing State Bank v. Saling,* 94 Neb. 594. Along the same line is the decision of this court in *Franklin State Bank v. Chaney,* 94 Neb. 1.

There appears to be sufficient competent evidence to sustain the verdict. We are unable to discover any prejudicial error. The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., not sitting.

SEDGWICK, J., dissenting.

The question in this case is as to the measure of damages; that is, how much has this land been damaged by straightening the course of the creek? Incidentally there are questions as to whether this issue was properly submitted to the jury.

The land taken by the ditch was 4.2 acres. The land that was claimed was damaged, though not taken, was 44.3 acres, besides two acres, which they say is isolated, and therefore damaged, making 46.3 acres. The verdict of the jury was for $3,910.63, which includes $600 that had already been paid by the defendant, and also includes interest. It might be a debatable question whether this land is damaged or benefited by this work; but that question, of course, was for the jury, and we must conclude that it was damaged. The question is whether, under any reasonable view of the evidence, it has been damaged as much as the jury has found. The plaintiffs figure out in the brief that this verdict allows $100 an acre for the land actually taken, and allows damages of $60 an acre for the land that was not taken, and insists that this is reasonable. The evidence in regard to the value of the land was conflicting, ranging somewhere from $60 to $100 an acre, and some perhaps a little higher. This damage of $60 an acre to the land not taken is wholly on account of the ditch rendering the land, as they claim, inaccessible. If we take the defendant's figures for it, they have allowed a great deal more than $60 an acre damages to the land not taken. The plaintiffs live on the north side of the Elkhorn river. The land in question was on the south side. Before this cut-off was made, to get to this land the plaintiffs went north about 100 rods, crossing a bridge over the river, and then south not quite a mile, and then west across Mr. Rodgers' land, 80 rods, to the land in question. This ditch is on the east side of the land in question, and they claim stops them from going that road. If the defendant succeeds in turning the water through this ditch so that the plaintiffs can cross the old bed of the river, they can go to their land directly in less than a half mile, but it is claimed that the water still stands in the old bed of the river and they cannot get across there now. If the defendant's claims in regard to the value of the land are somewhere near correct, then the jury has allowed the plaintiffs as damages more than the land was ever worth. It seems incredible that this tract of land is rendered

permanently inaccessible by this ditch, so as to entirely destroy its value. One hundred dollars an acre is a very high estimate of the value of any part of this land before the creek was straightened. The plaintiff, Fred Grimm, himself conceded that a large part of it was worth much less than that amount. He says that now it has no value, and so estimates that on the average it was damaged $60 an acre, and justifies the verdict. It cannot be found from this evidence that the land, or any part of it, was ever worth $100 an acre. It cannot be found that it is now worthless. It might be found that it has been rendered less valuable, at least temporarily, but reasonable men would seriously differ from that proposition. The judgment ought to be substantially reduced.

LETTON, J., concurs in this dissent.

LEO KLUG, ADMINISTRATOR, APPELLEE, V. ALBERT A. SEEGABARTH ET AL., APPELLANTS.

FILED APRIL 16, 1915. No. 18076.

1. **Wills: BEQUEST: LIEN: JURISDICTION.** The district court has original jurisdiction of an action to have a specific bequest of money declared a lien upon, and enforced against, real estate in the hands of the residuary legatee, though the construction of the will is involved.
2. **———: CONSTRUCTION: BEQUEST: LIEN.** The intention of the testator to make a bequest a charge upon real estate may be inferred, where the bequest is followed by the gift of the residue of real and personal property in one mass.
3. **Limitation of Actions: BEQUEST: SUIT TO ENFORCE LIEN.** An action to enforce the lien of a specific money bequest upon real estate in the hands of the residuary legatee is not barred until ten years from the time payment becomes due.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Affirmed.*

Isaac Powers, for appellants.

C. H. Stewart and *M. H. Leamy, contra.*

HAMER, J.

This action was brought in the district court for Pierce county for the purpose of having a specific bequest of money declared a lien upon real estate in the hands of a residuary legatee.

Ferdinand Seegabarth died in 1883, seized of certain real estate in Pierce county, and leaving a will which was admitted to probate, and which provided, first, for the payment of his funeral charges, the expense of administering his estate, and contained this provision: "Second. I give and bequeath to my beloved wife, Emelie C. A. Seegabarth, the sum of $500 in lieu of her dower, and of any distributive share in my estate to which she would be otherwise entitled. The said $500 to be paid over to the said Emelie Seegabarth, my beloved wife, upon the arrival of my eldest son at the age of 21, provided should my wife aforesaid marry before said eldest son arrives at the above mentioned age then this money to be paid to her by my executor provided she move off the farm now occupied by me, otherwise the money to remain in the estate until such time as my eldest son, Albert A. Seegabarth, arrive at the age of 21. It is my wish and desire that my said wife shall have the use of and profits of my farm after paying interest on mortgage and taxes which may become due from time to time, and which may be due and unpaid at the time of my decease, until such time as my son shall become of age.

"Third. I give and bequeath all the residue of my estate, real and personal, to my son Albert A. Seegabarth, to be paid to him as he becomes of age.

"In case he should not live to reach that age, then the said property to be divided among the rest of my children share and share alike, to be paid to them respectively as they become of age. In case they should die before becoming of age the said property to revert to my beloved wife, Emelie C. A. Seegabarth, provided that the said Al-

bert A. Seegabarth shall pay to each of my surviving children the sum of $300 upon their becoming of age respectively."

Ferdinand Seegabarth left as his heirs his wife, Emelie, his son, Albert, who is an appellant, and a daughter, Anna. Emelie Seegabarth elected to take under the will. In 1884 the widow of Ferdinand Seegabarth married Leo Klug. She continued to live on the farm until her death in 1897. She paid the interest and taxes as required by the will. No dower was ever assigned to her. The bequest of $500 was never paid to her. She died testate, leaving four children by her marriage with Klug. Her will, which was admitted to probate and under which Klug was administrator, contains a provision as follows: "I bequeath, devise and give away my personal and individual property as follows: The $500 coming to me from my first husband Ferdinand Seegabarth I wish divided between my children as follows." Then follow the terms of division. A decree was rendered in the district court in favor of the administrator of Mrs. Klug, finding the bequest to her by Seegabarth a lien upon the real estate which passed by his will, and foreclosing this lien.

The first objection urged is that the district court did not have original jurisdiction to entertain the action. In this connection it is now well settled that the county courts have exclusive jurisdiction of all matters of probate and plenary powers for the exercise of that jurisdiction. *Reischick v. Rieger,* 68 Neb. 348; *Williams v. Miles,* 63 Neb. 859. In the first of these cases it is said, among other things, in the syllabus: "The county court has exclusive original jurisdiction of all probate matters, and where the relief sought by an action is such as the county court, in the exercise of its probate jurisdiction, might grant, the district court has no original jurisdiction."

Section 16, art. VI of the Constitution, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts; in all matters relating

to apprentices; and such other jurisdiction as may be given by general law."

The county court is the court having exclusive original jurisdiction over all matters of the probate of wills, the appointment of administrators and executors, the administration of estates, etc.; but this does not operate to exclude the jurisdiction of the district court in a case where the construction or consideration of a will is incidentally involved and the relief demanded does not call for a direct exercise of probate power. *St. James Orphan Asylum v. Shelby,* 75 Neb. 591. Where the purpose of the proceeding is to further administration or settlement of the estate, to construe a will for the guidance of the executor or administrator, then the only court having original jurisdiction is the county court; but in the present case the purpose of the suit is not to further administration, but it calls for the exercise of power not connected with the probate of the will or administration of the estate of Seegabarth. In the case last cited it is said in the syllabus: "The original jurisdiction of the district court over an action to quiet the title to real estate is not affected by the fact that incident thereto there is involved the construction of a will." In such a case as this, the fact that the construction of a will is involved does not exclude the jurisdiction of the district court. In *Youngson v. Bond,* 69 Neb. 356, this court considered the question. A construction of a will by the county court is for the information and benefit of the executor and administrator only. It does not affect the controversies between adverse claimants.

In *Andersen v. Andersen,* 69 Neb. 565, it was said in the syllabus: "The county court has jurisdiction to construe wills for the purposes of the administration and settlement of estates. But the construction of a will, in such a case, is for the information and benefit of the executor or administrator only, in order to advise him what course to pursue. It will protect him from any charge of maladministration of the estate, but it adjudicates nothing beyond his rights and liabilities in the execution of his of-

fice; controversies between adverse claimants, under the devise, will not be affected thereby."

It is also contended that the legacy could not be held a charge against the real estate unless such intention could be gathered from the will; but it is generally held that such intention must be inferred from the gift of a legacy followed by the gift of the residue, real and personal, in one mass, since otherwise there could be no residue of the real estate. 3 Pomeroy, Equity Jurisprudence (3d ed.) sec. 1247.

It is next urged that the suit is barred by the statute of limitations. The suit was brought less than ten years after defendant became of age, at which time the legacy was payable. It follows that, if the intent of the testator was to make the legacy a charge upon his real estate, it became a lien thereon, and the period within which it could be enforced is controlled by that section of the statute providing for the recovery of real estate, and which is ten years.

It follows that the judgment of the district court is right, and it is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

ROBERT Y. LISCO, APPELLEE, V. WILLIAM HUSMANN ET AL., APPELLANTS.

FILED APRIL 16, 1915. No. 18389.

Partnership: DISSOLUTION. Where the defendants held possession of a farm under a farm contract and also of certain live stock and farming implements, and the evidence shows a breach of the contract because the live stock is neglected and mistreated, and farm implements unnecessarily injured, and a farm building destroyed, there is a sufficient reason for the dissolution of the partnership by the judgment of a court.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

Albert & Wagner, for appellants.

Garlow & Long, contra.

HAMER, J.

The plaintiff and appellee, Robert Y. Lisco, was the owner of a farm, a lot of live stock, and farming implements. He entered into a farm contract with the defendants William and Albert Husmann. After the defendants had been in possession of the farm, live stock and implements for about a year, the plaintiff sued them, seeking a dissolution of the contract, a division of the profits, and such relief as the contract contemplated might be given. There was a finding and judgment for the plaintiff in the district court for Platte county, and from this finding and judgment the defendants appeal.

The contract was entered into on the 28th day of August, 1911. Omitting the signatures, it is as follows:

"This lease, made and entered into this 28th day of August, A. D. 1911, by and between Robert Y. Lisco, of Columbus, Nebraska, party of the first part, and William Husmann and Albert Husmann, both of Platte county, Nebraska, parties of the second part, Witnesseth: That the said party of the first part has this day leased unto the said parties of the second part the following described real estate, to wit: the southwest quarter of section 26, and lots numbered 6 and 7 of said section 26, all in township 17, range one west of the 6th P. M. in Platte county, Nebraska, from the first day of September to the first day of March, 1917.

"In consideration of the leasing of the premises as aforesaid, the said parties of the second part covenant and agree to pay said party of the first part one-half of all the receipts from the grain, hay, stock, etc., raised on said premises during the term of this lease, said payments to be made at the time of the sale of any such products.

"The party of the first part and the parties of the second part are each to provide one-half of all machinery and agricultural implements needed to properly work said

place; one-half of all seed needed for seeding purposes; one-half of all the horses needed to properly till said land; it being the intention of the parties hereto that said first party is to furnish the land, and said second parties are to furnish and perform the labor necessary to properly care for the stock on said farm and to properly till said land, and each to share equally in the net proceeds thereof, i. e., said Lisco is to receive fifty per cent. of the net proceeds and said Husmanns are to receive fifty per cent. of the net proceeds.

"The personal property which is now upon said premises, and in which both first and second parties have an equal share, is contained in a list hereto attached and which is made a part of this contract and marked exhibit A. Also the terms noted on said exhibit regarding the hay, corn, oats and potatoes is hereby made a part of this contract and is so considered by the parties hereto.

"Should fences need repair, first party is to furnish all wire necessary therefor, and second parties are to perform all labor and furnish all fence posts; said posts, however, to be cut from the above premises.

"First party reserves one bedroom in the house now on said premises, and also reserves the small garden patch lying east of the house and inclosed by a fence.

"It is made the duty of the second parties hereto to keep a strict account of the sales of all products of every kind and description raised on said farm, and a strict account of the sales of all stock sold therefrom, and report same to said first party. It is agreed between the parties hereto that all money received from the sale of any property from said farm shall be deposited in the German National Bank in the name of Husmann Brothers, and all expenses in connection with the operation of said farm shall be paid by checks drawn by said Husmann Brothers on said bank.

"All materials needed for the repair of the buildings on said place shall be furnished by said first party; the labor, however, to be performed by second parties.

"Second parties are privileged to cut sufficient wood on said premises to properly heat the house thereon, and said first party is also privileged to go upon said place to cut wood for his use.

"Second parties agree that at the expiration of this lease to yield up possession of the place in as good condition as it now is, the usual wear, inevitable accidents and loss by fire excepted. In case of the nonfulfilment of any of the terms and conditions of this lease, first party may at his election declare this lease at an end. Signed in duplicate the day and year first above written."

The paper referred to in the contract as exhibit A contains a list of 5 horses, 1 colt, 22 cows, 8 yearling heifers, 20 calves, 132 sheep, 1 boar, 3 brood sows, and 5 gilts; also, a manure spreader, 2 mowers, a hay rake, a hay stacker, a hay sweep, 2 hay racks, 1 hay loader, 1 disc, 1 plow, 1 cultivator, 1 harrow, 1 weeder, 1 potato planter, a potato digger, a potato sprayer, 2 potato shovels, a grindstone, a cream separator, a cream scale, and 5 sets of work harness. Each article is valued at a specified price, and together all the animals and the machinery and implements named are valued at $3,240. There is a further provision that the hay is to be measured October 1 at $10 a ton, and the oats to be at the market price when threshed, and the corn to be at the market price when husked, and the potatoes to be at the market price when put in the cellar. It is claimed by the appellants that the parties acted upon the theory that the contract was to begin on the 1st day of September, 1911; that the defendants took charge of the premises and stock at that time.

The trial took place July 2, 1913, and the case was taken under advisement until October 14, 1913, when the court found and decreed as follows: "(1) That a valid copartnership existed between the plaintiff and the defendants. (2) That the plaintiff is entitled to a dissolution of the copartnership agreement and forfeiture of the lease as prayed in his petition. (3) That the plaintiff is entitled to receive one-half of the assets, and the defendants are entitled to receive one-half of the assets, of the copartner-

ship. (4) That, in case the plaintiff and defendants fail within 60 days to make a division and adjustment of the partnership assets, then plaintiff is entitled to have a receiver appointed to wind up and adjust the copartnership affairs. It is therefore considered, adjudged and decreed by the court that the contract of copartnership heretofore existing between the plaintiff and the defendants be and the same hereby is dissolved and terminated; that the lease set forth in the petition be and the same hereby is declared forfeited and terminated; that the defendants shall render to the plaintiff a strict account of their doings in relation to the copartnership, and a complete statement of all personal property disposed of and the proceeds therefrom, together with an inventory of all copartnership property on hand; that the copartnership assets be equally divided between the plaintiff and the defendants, and, in case they fail to effect a full settlement within 60 days from this date, a receiver shall be appointed by the court, with power to reduce the copartnership assets to cash and wind up and adjust the affairs of the copartnership; that the defendants be adjudged to pay the costs of this action."

The finding is for the dissolution of the agreement and the forfeiture of the farm contract; that the plaintiff should receive one-half of the assets and the defendants one-half of the assets of the copartnership, and, in case of failure to make a division that a receiver shall be appointed to wind up the affairs. The decree forfeits and terminates the contract, provides that the defendants shall render a strict account in relation to the doings of the business, a complete statement of all personal property disposed of and all "copartnership property on hand," that the copartnership assets be equally divided; that, in case plaintiff and defendants fail to effect a full settlement within 60 days, a receiver be appointed, "with power to reduce the copartnership assets to cash and wind up and adjust the affairs of the copartnership."

The petition alleges the failure to comply with the contract which is set out in the findings and decree of the dis-

trict court. An examination of the evidence seems to sustain the judgment of the district court.

One horse got an abscess on his shoulder. This resulted in the sweeny. This horse had not been taken care of according to the directions of the veterinary surgeon, and the injury was claimed to be permanent because of neglect. A colt that was castrated was also neglected and suffered because of the neglect. The three mares were worked down until they were very thin in flesh and their shoulders "were all galded." These animals seem to have been fat and healthy when they were turned over to the defendants. It seems that they agreed orally to milk at least 12 of the cows. They never did so. They got down to milking just one cow. The udders of the cows were injured because they were not milked. These cows were in good condition when turned over to the defendants. There were also 20 calves. There is testimony tending to show that the calves were nearly starved. They were kept in a lot where there was insufficient grass, and were not given alfalfa to eat, although there was plenty there out of which they might have been fed. These were all high-grade cattle. There were 132 sheep also in good condition when turned over to the defendants. They were high-grade Shropshire sheep. They were not taken care of, and the result was a failure of a crop of lambs. There was a sheep shed in which to shelter them, but the defendants tore it down. They neglected to give the hogs fresh water, and compelled them to drink manure water down by the barn. An examination of the evidence shows that the farm implements were badly treated.

It is claimed by the attorneys for the appellants that the evidence fails to sustain the finding and judgment of the district court. There is something of an attempt to show that the defendants complied with their contract, but we are not able to say that the findings and judgment of the district court are wrong. The facts alleged in the petition all have testimony tending to support them.

In *Veith v. Ress*, 60 Neb. 52, it is said: "It is next contended that the petition does not state facts sufficient to

warrant the court in taking cognizance of the cause. We think it does. It shows insolvency, dissension between the partners, probability of waste, and necessity for an accounting and dissolution."

In *Carroll v. Cunningham*, 73 Neb. 295, there was a demurrer to the petition because it did not state a cause of action. It set out that defendant had large "accumulations of and belonging to the partnership, which he refuses to account for or make division of in compliance with the agreement and the request of plaintiffs * * * and which he threatens to sell and dispose of." There is a similarity in that case to this one, except the specific acts of extreme negligence set forth in the instant case. The judgment of the district court is affirmed. Plaintiff not being entirely without fault, each party is required to pay his own costs.

AFFIRMED.

MORRISSEY, C. J., LETTON and FAWCETT, JJ., not sitting.

STORZ BREWING COMPANY, APPELLEE, V. CARL F. HANSEN ET AL., APPELLANTS.

FILED APRIL 16, 1915. No. 18958.

EXECUTION: APPLICATION OF SURPLUS. Plaintiff had foreclosed a mortgage upon a tract of real estate belonging to defendant, and was also the owner of a judgment rendered in the same court. An execution was issued on the judgment and levied upon the real estate. The premises were sold to the plaintiff at the execution sale; no deduction of liens being made. There was a surplus of the proceeds of the sale after paying the execution debt. An application was made by plaintiff to apply the surplus upon the foreclosure decree *pro tanto*, upon which issues were made up and a hearing had. *Held*, that the district court properly decided that in equity the creditor was entitled to have the surplus applied upon the foreclosure decree.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

F. Dolezal, for appellants.

George W. Wertz and *James W. Hamilton, contra.*

HAMER, J.

The facts in this case are stated in the former opinion, *Storz Brewing Co. v. Hansen,* 89 Neb. 685. The judgment was reversed and the case remanded to the district court, so as to allow the plaintiff to make a proper application to apply the surplus proceeds of the sale upon the foreclosure decree and to try any issues raised upon such application. Issues were framed and the cause tried accordingly.

The court found generally for the plaintiff on the motion, that there was due upon the judgment at the time of the sale $576.60, together with costs amounting to $27.35, and that at the time of such sale the plaintiff was the owner of a judgment of foreclosure against the defendant in the sum of $1,886.53, which constituted a second lien upon the premises sold under the execution, and that no part of the said amount had been paid. It was also found that Carl F. Hansen was insolvent, and that the portion of the sum bid at the execution sale which was not consumed by the judgment and costs amounted to $657.35, and that this sum should be applied by the plaintiff upon its judgment and decree of foreclosure, the costs of the proceeding to be taxed against the defendant Carl F. Hansen.

The proceeding was of the nature of an equitable garnishment. The mortgage was a lien on all of Hansen's interest in the property, including his homestead interest, and the surplus proceeds. Hansen is insolvent. He owes the brewing company more than $1,800. It would be grossly inequitable to allow him to retain the surplus arising from the sale.

The judgment of the district court is

AFFIRMED.

TONY N. MAROOSIS, APPELLANT, V. PETER CATALANO, APPELLEE.

FILED MAY 1, 1915. No. 18073.

1. **Affidavit:** ACKNOWLEDGMENT. A notary public who is an attorney of record in a pending suit is not a proper officer to take an affidavit to be used as evidence on a hearing in the cause.
2. **Garnishment:** ACTION AGAINST GARNISHEE: GENERAL DENIAL. Where suit is brought under section 8385, Rev. St. 1913, for alleged unsatisfactory answer in garnishment, a general denial is a sufficient answer.
3. **New Trial:** MOTION: TIME. When a party against whom a judgment has been entered in the district court files a motion for a new trial within three days after the entry of the judgment, and during the same term at which the judgment was recovered, but the term is adjourned before the court rules thereon, he is entitled to a ruling at a subsequent term.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

John S. Bishop, for appellant.

E. G. Maggi, T. S. Allen and *H. L. Wilson, contra.*

MORRISSEY, C. J.

Plaintiff recovered judgment in justice court on two promissory notes executed by one Will Catalano, the son of this defendant. He then caused summons in garnishment to be served on defendant in this action, who appeared before the justice, made his answer in garnishment, and was discharged. Subsequently plaintiff brought this suit under section 8385, Rev. St. 1913, for alleged unsatisfactory answer in garnishment. Judgment went in favor of defendant, and the plaintiff appealed to the district court. On May 7, 1912, judgment was entered by default in favor of plaintiff. Within three days thereafter, and at the same term, defendant filed a motion to set aside the judgment. This motion was supported by the affidavits of E. G. Maggi and Mrs. C. Blanche Stevens.

Defendant also tendered an answer constituting a general denial. Plaintiff filed a motion to strike the affidavit of Mr. Maggi because it was sworn to before T. S. Allen, one of defendant's attorneys of record, and to strike the affidavit of Mrs. Stevens because it was sworn to before her husband, and to strike the answer because filed out of time, that it was a sham pleading, and did not set up a meritorious defense. These motions were not ruled on by the trial court until the succeeding term, when the motion of plaintiff to strike was sustained, and the motion to set aside the default judgment was overruled. Defendant then filed a motion for rehearing, which the court sustained. The motion of plaintiff to strike was overruled, and the motion of defendant to set aside the default judgment was sustained. The cause was subsequently tried to a jury, and there was a verdict and judgment in favor of the defendant. Motion for new trial was overruled, and plaintiff appeals.

A number of errors are relied upon for reversal, but special stress is laid upon the rulings of the court in refusing to strike from the files the affidavits of Mr. Maggi and Mrs. Stevens. The record shows that Maggi, who subscribed to the affidavit, and Allen, the notary public before whom the same was made, were attorneys of record for the defendant. Under sections 371-376 of the Code (Rev. St. 1913, secs. 7937-7942) and the construction thereof in *Collins v. Stewart*, 16 Neb. 52, *Horkey v. Kendall*, 53 Neb. 522, and *Malcolm Savings Bank v. Cronin*, 80 Neb. 228, a notary public who is also an attorney of record in the case is not a proper party before whom affidavits of this kind may be taken, and the affidavit of Maggi ought to have been stricken from the files. Mrs. Stevens' affidavit is attacked because she subscribed the same before her husband, who is a justice of the peace, and it is contended that it was inadmissible under section 376 of the Code. This section provides: "The officer before whom depositions are taken must not be a relative of either party," etc. It does not appear that the justice is related to either party, and this objection is without merit.

With the affidavit of Maggi out of the record, the affidavit of Mrs. Stevens remains to support the motion if, indeed, it be necessary to support it by affidavit.

"The vacation of a judgment by default during the term at which it is rendered is largely within the discretion of the trial court, and presents no grounds for reversal unless there appears to have been a clear abuse of discretion." *Bigler v. Baker,* 40 Neb. 325. The motion to set aside the default judgment was made in due season, it was directed to the sound judicial discretion of the court, and the affidavit of Mr. Maggi may be entirely disregarded, and still the action of the court be sustained.

Plaintiff also complains that the answer, which is a general denial, is insufficient; but there was only one question to determine, and that was whether the defendant had made a complete and truthful answer in garnishment. In fact, we find in the record an affidavit of plaintiff's attorney in which he states that this is the only question. The petition alleged that he did not. By the general denial defendant put this question squarely in issue, and it must be said to be a sufficient answer.

It is also contended that the court is without jurisdiction to vacate a judgment and grant a new trial after the term at which it is entered, and a number of authorities are cited. These authorities, however, are not in point, and it is not necessary to discuss them. In the instant case the motion was filed at the term at which the judgment was entered, and because the court deferred action until the subsequent term it did not lose jurisdiction. In *Hitchcock County v. Cole,* 87 Neb. 43, and other cases cited in the brief, the motion was not filed until after the adjournment of the term at which the judgment was entered, and this court has uniformly held that they came too late, while in the instant case the motion was duly filed during the term. The defendant had taken every step necessary to protect his rights, and the power of the court was not ended until it ruled on this motion, and it did not lose jurisdiction merely by the adjournment of the term.

Error is assigned on the giving and refusal to give instructions, but, in the view we take of the case, the jury were properly instructed, and the judgment is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

CHARLES A. STICKNEY COMPANY, APPELLANT, v. L. E. NICHOLAS, APPELLEE.

FILED MAY 1, 1915. No. 18079.

Conditional Sale: RIGHT TO RECOVER PRICE: DESTRUCTION BY FIRE. There may be a recovery of the purchase price of personal property which has been sold and delivered on condition that the title shall not pass until full payment is made, although, without the fault of the purchaser, the property is destroyed by fire, when the vendee's promise to pay is absolute, and the contract gives him the right to extinguish the vendor's title by payment of the stipulated price.

APPEAL from the district court for Merrick county: GEORGE H. THOMAS, JUDGE. *Reversed.*

Elmer E. Ross, for appellant.

H. F. Allen, contra.

MORRISSEY, C. J.

Plaintiff, Charles A. Stickney Company, the manufacturer of a gas engine, April 5, 1911, shipped to defendant, a retail merchant, a gas engine, under a written contract containing the following provision: "Seventh. It is agreed that the title to and ownership of all goods shipped under this contract shall remain vested in the Charles A. Stickney Company, and the goods are to be held at all times subject to their order until paid for, and if sales are made before payment they shall be made only in the regular course of business, and the proceeds of all such sales, whether cash, book account or notes, are to be held as the property of Charles A. Stickney Company in trust as collateral security for their benefit, and subject to their

order until all obligations arising under this contract are fully paid in money, and it is agreed that notes taken by the company are not accepted as payment. And it is further agreed that nothing in this clause shall release the purchaser from making the payments as herein stipulated." The purchase price was not paid, but while the property was in the possession of the defendant, and without fault or negligence on his part, it was totally destroyed by fire. Plaintiff brought suit for the purchase price, and defendant by answer alleged that under the section of the contract above set out, at the time the property was destroyed, the title was in plaintiff, and he was holding it subject to its order. A jury was waived, the cause was tried to the court, and, from a judgment for the defendant, plaintiff appeals.

There was some correspondence between the parties which indicates that the engine did not prove satisfactory on a test, and that plaintiff had agreed to send an expert to adjust it. However, as each party relies upon that part of the contract quoted, the case must be determined solely on the construction thereof. The courts are not unanimous, but the weight of authority seems to favor the rule that, where goods are sold and delivered upon condition that the title is retained in the seller until the purchase price is paid, the reservation gives the seller only a lien upon the property for the amount of the debt. The rule is different where there is anything further for the seller to do; but where he has delivered the property, and he has no option to rescind his contract and retake possession, the mere reservation of title for the purpose of securing payment of the debt will not defeat his right to recover where the property is accidentally destroyed. In this case the vendee had possession with full right to sell, and any person dealing with him would have acquired good title to the property, and the reservation made in the contract between the parties merely gave the vendor the right to pursue the property until sold in the regular course of business, or, in case of sale, to have the funds arising therefrom held as a trust fund to secure the pay-

ment of the debt. He had no option to rescind, and there was nothing further for him to do but to accept payment, and it is expressly provided in the final sentence "that nothing in this clause shall release the purchaser from making the payments as herein stipulated." The parties were able to contract, and this defendant voluntarily assumed the risk of loss or damage. The loss of the article in no manner changes the character of the agreement, and the vendee must be held liable for the purchase price.

In *LaValley v. Ravenna*, 78 Vt. 152, 2 L. R. A. n. s. 97, the supreme court of Vermont had before it a similar question, and disposed of it in the following language: "The question presented, stated broadly, is this: Can there be a recovery for property sold and delivered on condition that the title shall not pass until full payment therefor has been made, when, without the fault of the purchaser, the property is destroyed before the price falls due? This question we answer in the affirmative. It is true that these contracts are sometimes spoken of as 'executory,' and the purchaser is termed a 'bailee,' * * * but these expressions have reference to the strict legal title to the property, and should not determine the present question, which is one pertaining to an absolute promise to pay. And the defendant's promise to pay was absolute, and was made upon a sufficient consideration; for he got just what he bargained for—the use, possession and enjoyment of the property, with the right to acquire the absolute title upon payment of the stipulated price—and this was the consideration for his promise. The seller had done all that he was to do to or with the property by the terms of the contract—all that he was to do at all, except to receive the price. And upon that the title passed without further action on the part of either party." For other cases in point, see note to *LaValley v. Ravenna*, 2 L. R. A. n. s. 97.

It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED.

LETTON and SEDGWICK, JJ., not sitting.

BALL ENGINE COMPANY, APPELLANT, V. BENNETT COMPANY, APPELLEE.

FILED MAY 1, 1915. No. 18089.

1. **Limitation of Actions: FOREIGN CORPORATIONS.** The statute of limitations of this state does not run in favor of a foreign corporation while service of summons cannot be had upon it in this state.
2. **———: FOREIGN STATUTES: PLEADING AND PROOF.** If a party seeks to avail himself of the statute of limitations of a foreign state, he must both plead and prove the statute.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

DeBord, Fradenburg & Van Orsdel, contra.

MORRISSEY, C. J.

Plaintiff, the Ball Engine Company, a Pennsylvania corporation, in December, 1905, furnished repairs for an engine to the defendant, the Bennett Company, a Delaware corporation, doing business in Omaha, Nebraska. On December 3, 1908, the engine was broken, and defendant again purchased repairs from the plaintiff, amounting to $606.50. The bill fell due on February 15, 1909, and, on defendant's failure to pay, plaintiff brought suit January 29, 1910. Defendant admitted receipt of the goods, but alleged that they were furnished to take the place of defective parts, and parts broken because of defective parts, of an engine manufactured and sold by plaintiff under its implied warranty, and that no amount was due thereon; and by way of counterclaim alleged that in December, 1905, an accident occurred to this engine whereby the crosshead was broken, and the defendant purchased a new crosshead from plaintiff, and that by implication the plaintiff warranted the same as being reasonably safe for the use for which it was to be put and free from defects, that

there was a latent defect in the crosshead, and that the defect was so covered up and hidden that it was not detected by defendant, and that as a result of this latent defect, on December 3, 1908, the engine was broken, and defendant suffered damage in the sum of $1,895.92; and there was a prayer for judgment. Among other allegations, plaintiff's reply contained the following: "For further reply, plaintiff avers that the alleged cause of action contained in defendant's answer as a counterclaim and set-off did not accrue within four years next before the commencement of this action, and therefore is barred by the statute of limitations of this state." The court instructed the jury to find for plaintiff for the full amount of its claim, but left the jury to determine what, if any, amount was due upon the set-off. After crediting plaintiff with the full amount sued for, the jury gave a verdict for $1,000 in favor of defendant. Plaintiff moved for judgment notwithstanding the verdict, and this motion was overruled.

The principal point contended for by the plaintiff is that the statute of limitations had run against defendant's counterclaim. The defective parts were purchased in December, 1905. Defendant's answer and cross petition was first filed in the county court June 7, 1910. It appears on the face of the pleadings that plaintiff was a Pennsylvania corporation, and the defendant a Delaware corporation doing business in Nebraska. The breach of warranty accrued more than four years before the counterclaim was asserted. By reply plaintiff pleaded the statute of limitations of Nebraska. The record shows the plaintiff was at all times a nonresident of this state and service of summons could not have been had upon it here. Defendant could not have brought suit against it on the cause of action pleaded, unless we are to hold that it was bound to go to Pennsylvania to institute a suit.

Section 20 of the Code (Rev. St. 1913, sec. 7577) provides: "If, when a cause of action accrues against a person, he be out of the state, * * * the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought." In

construing this section in *Hartley v. Crawford,* 12 Neb. 471, the court said: "'If, when a cause of action accrues against a person, he be out of the state, * * * the period limited for the commencement of the action shall not begin to run until he come into the state,' etc., applies to all personal causes of action, whether they accrue within or without this state, or in favor of a resident or a nonresident thereof."

In *Edgerton v. Wachter,* 9 Neb. 500, it is held that the statute commenced to run at the time of defendant's removal with his family into this state. This is followed and approved in *Minneapolis Harvester Works v. Smith,* 36 Neb. 616.

This question was before the supreme court of the United States in a Nebraska case (*Express Company v. Ware,* 20 Wall. (U. S.) 543), and an instruction, which told the jury that to bar the action the plaintiff must have been able for the full statutory period before suit was brought to have sued the defendant in this state, was approved.

The statute of Kansas is substantially like ours, and there it is held: "A foreign corporation is 'out of the state' within the meaning of section 21 of the Code (Gen. St. 1901, sec. 4449), and for that reason cannot avail itself of the statute of limitations of this state." *Williams v. Metropolitan Street R. Co.,* 68 Kan. 17, 1 Am. & Eng. Ann. Cas. 6.

It is not necessary to determine, and we do not determine, whether the statute of limitations of Pennsylvania was available as a defense to the counterclaim. Plaintiff did not plead nor prove that the statute of Pennsylvania had run against defendant's cause of action, and since it clearly appears that when the cause of action accrued plaintiff was not within the state of Nebraska, and that defendant asserted its claim before the statutory period had run after plaintiff came within our jurisdiction, the statute of limitations had not run against defendant. "Statutes of other states are regarded as matters of fact, and when relied on to support a cause of action or defense must be pleaded and proved." 36 Cyc. 1240. The statute of limi-

tations is an affirmative defense, and unless raised it is waived. If plaintiff intended to avail himself of the statute of a foreign state, it was essential that he both plead and prove that statute. He saw fit to plead only the statute of Nebraska; and, as it appears that by reason of plaintiff's absence from the state the statute had not run, it follows that the judgment of the district court is right, and must be

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

MAUDE P. WARRINGTON, ADMINISTRATRIX, APPELLEE, V. WILLIAM A. STEWART, APPELLANT.

FILED MAY 1, 1915. No. 18102.

1. **Appeal: FINDING: EXISTENCE OF PARTNERSHIP.** In an action for a partnership accounting, where the existence of the partnership is denied by one of the alleged partners, the finding of the district court that there was a partnership, if supported by the evidence, will not be disturbed.
2. **———: ACCOUNTING: MODIFICATION OF DECREE.** The findings of the district court in making the accounting, in so far as they appear to be correct, will not be disturbed; but, where it appears that one of the partners has not been given a credit for certain sums of money paid by him for the benefit of his deceased partner, such credit will be given, and the judgment of the district court, as thus modified, should be affirmed.

APPEAL from the district court for Dawson county: RALPH W. HOBART, JUDGE. *Affirmed as modified.*

H. M. Sinclair and *E. A. Cook,* for appellant.

Niles E. Olson and *Wilcox & Halligan, contra.*

BARNES, J.

Appeal from a judgment in an action for a partnership accounting. The cause was tried in the district court

for Dawson county before Honorable Ralph W. Hobart, judge of the Seventeenth judicial district, sitting for Judge Grimes, of the Thirteenth judicial district, and resulted in a judgment against the defendant for $3,749.89. From that judgment defendant has appealed.

It appears that the defendant and Theodore L. Warrington in the year 1892 became equal partners in the practice of the law at Lexington, Nebraska, and continued in business until the 17th day of January, 1906, at which time there was an accounting between them and a settlement of their partnership business; that at that time Warrington, who was in ill health, went with his wife and one of his daughters to the Pacific coast; that he returned some time in April, 1906, and from the date of his return until his death, which occurred in March, 1911, Warrington occupied a desk in their old office in Lexington, Nebraska. It was claimed by defendant, Stewart, that the partnership, which had existed between himself and Warrington, was dissolved and terminated at the time of their settlement in 1906, while it was insisted by the administratrix of Warrington's estate that the partnership was never dissolved until Warrington's death. That issue was resolved in favor of the administratrix, and, while the evidence on that question was somewhat conflicting, we are not disposed to disturb the finding and judgment of the trial court so far as that issue is concerned. We give full credit to the testimony of Judge Sinclair, and it is apparent that when Warrington went to the Pacific coast he never intended to return and engage in the practice of law; but it appears that, having in a measure recovered his health, he did return, and the partnership was apparently continued from the date of his return until his death, and we think there is sufficient evidence to sustain the finding of the trial court on that question.

As to the matter of the accounting, the evidence seems generally to sustain the findings of the trial judge that from January, 1906, until the time of Warrington's death, the firm earned $20,331.64, of which amount Warrington received $3,956.65 and Stewart received $16,374.99; that

Stewart paid all of the expenses of the business, amounting to $4,918.56, and that Warrington's estate should receive $7,706.54; that Warrington had received only the sum of $3,956.65, leaving a balance due his estate from the partnership of $3,749.89. We find, however, upon an examination of the record, that Stewart paid for and on account of debts owing by Warrington, and at his request, the sum of $1,967.10, consisting of the following items: To the First National Bank of Lexington, $505.15; to Mrs. Jane Wilder, $1,376.95; to cash by draft sent to Warrington at Dayton, Oregon, $85.

So far as we are able to discover from the record, the trial court failed to give Stewart that credit. This would leave a balance due from Stewart to the Warrington estate of $1,782.79. As we view the record, the judgment of the district court should be modified to that extent, and appellant should recover his costs in this suit.

As so modified, the judgment of the district court is

AFFIRMED.

FAWCETT, SEDGWICK and HAMER, JJ., not sitting.

The following opinion on motion to modify judgment was filed September 20, 1915. *Judgment modified.*

PER CURIAM.

The appellee has filed a motion asking the court to modify the judgment for the reason that the court in recasting the account failed to give her credit for an item of $750 which she claims was admitted by the appellant to be due her. The court permitted the appellant to file a brief in answer to this contention. In this brief it is conceded that the appellee was entitled to this credit. In addition, the brief argues that this court erred in its conclusions upon the evidence and in the amount of its judgment. The appellant filed no motion for a rehearing within the time fixed, challenging the correctness of the original judgment. The adjudication, therefore, became final as to him.

The evidence supports the appellees contention as to the $750 item. She is entitled to have the judgment increased to that extent.

JUDGMENT MODIFIED.

V. FRANKLIN V. CHARLES C. HESKETT, APPELLANT, JOHN S. CRANOR, APPELLEE.

FILED MAY 1, 1915. No. 18118.

Mortgage Foreclosure: DEFENSE: DEFECT OF TITLE. In an action to foreclose a purchase money mortgage, when it clearly appears that the mortgagor has obtained a good title to the mortgaged premises by reason of the fact that he and his grantors have been in the open, notorious, exclusive and uninterrupted possession of the premises for more than 22 years, claiming adverse to all the world, a defect in the paper title of his remote grantor is no defense to the foreclosure proceedings.

APPEAL from the district court for Hitchcock county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Eldred, Cordeal & McCarl, for appellant.

Lambe & Butler, contra.

BARNES, J.

This was an action of foreclosure. A judgment was rendered by the district court for Hitchcock county by which the defendant John S. Cranor obtained a decree foreclosing his mortgage for $1,000 on a certain tract of land in that county, and the defendant Heskett has appealed.

The facts as they appear from the record may be briefly stated as follows: One Steinhaus was the owner of the west half of the southeast quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section 32, in township 2 north, of range 31 west of the sixth P. M., in Hitchcock county, Nebraska. He died intestate, and the administrator of his estate sold and conveyed the land in question to August Anderson, whose deed was recorded April 4, 1888. It may be conceded that the deed by which he obtained his title was voidable for irregularities in the administrator's sale. Anderson went into possession when he obtained his deed, and in March, 1904, conveyed the land by warranty deed

to Cranor. In 1907 Cranor conveyed to Heskett, and his conveyance contained other lands. Heskett at the time gave Cranor a purchase money mortgage for $4,000, due September 4, 1910. In June, 1909, Heskett paid Cranor all but $1,000 of this indebtedness and gave him a new note and mortgage on the land in controversy, due September 16, 1910, which mortgage was recorded June 8, 1909. On December 22, 1909, Heskett and wife gave plaintiff, Franklin, a mortgage on this and other lands for $3,890.10. Franklin commenced foreclosure proceedings in February, 1911, making Heskett and wife and Cranor and wife parties defendant. Cranor, having moved to Wyoming, was served by publication, and a default decree of foreclosure was awarded Franklin on May 3, 1911. On November 18, 1911, Cranor was allowed by the court to open up the decree, and thereupon he filed an answer and cross-bill praying for a foreclosure of his prior mortgage on so much of the land as was described therein. The plaintiff, Franklin, and the defendant Heskett filed like replies to Cranor's answer and cross-bill, alleging that the title acquired by Anderson, who was Cranor's grantor, was void for irregularities; that plaintiff Franklin had obtained quitclaim deeds from the heirs of Steinhaus. Heskett alleged that Franklin had ousted him from possession, and that the title to the Steinhaus land conveyed by Cranor to him had failed. Both prayed that Cranor's mortgage be canceled. Cranor by his reply alleged, among other things, that he and his immediate grantor, Anderson, had been in the open, notorious, exclusive and adverse possession of the Steinhaus land from April 4, 1888, until he conveyed it to Heskett, and that the deed by him to Heskett conveyed a good and perfect title. The reply also contained an allegation of conspiracy on the part of Franklin and Heskett to deprive him of his rights under his mortgage. The cause was tried upon the issues thus joined, and resulted in findings and a decree in favor of Cranor foreclosing his mortgage.

It thus appears that the controlling issue in this case is one of fact, and the real question to be determined is:

Did Anderson and Cranor have the open, notorious, exclusive and adverse possession of the land in question a sufficient length of time before it was conveyed to Cranor to give him a good title thereto?

It appears from the testimony that August Anderson purchased the Steinhaus land at administrator's sale in the spring of 1888, and received a deed therefor, which was recorded in April of that year. The witnesses Phillips, Knobbs, Brennan, and Josephine Anderson, his widow, all testified that he took possession of the land and broke a part of it in the year 1888, and fenced all of it the following season; that he continued in uninterrupted possession of the land and paid the taxes thereon until he sold it to Cranor in 1904. The testimony also shows that Cranor took possession of this and other lands and remained in possession until he sold to defendant Heskett in 1907; that Heskett has remained in the uninterrupted possession of it ever since that date. While there were irregularities in the administrator's sale to Anderson, he took possession under color of title, and the evidence is clear and convincing that he and his grantees, Cranor and Heskett, have been in the open, notorious, adverse and exclusive possession of the Steinhaus farm for more than 22 years. It appears that plaintiff, Franklin, in the year 1911 obtained quitclaim deeds from the two Steinhaus heirs for the sum of $1 each, but Franklin has never disturbed Heskett in his possession. Such being the case, Heskett's allegation of disseizin was not sustained. It seems clear that the title which Heskett obtained from defendant Cranor is valid, and therefore he had no defense to the $1,000 mortgage given by him to Cranor.

The judgment of the district court was clearly right, and is

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

CHARLES H. BROWN, APPELLANT, V. DOUGLAS COUNTY ET AL., APPELLEES.

FILED MAY 1, 1915. No. 18138.

1. **Taxation: RAISE OF VALUATION.** A county board of equalization cannot raise the assessed valuation of the real estate of an individual taxpayer without a complaint and without notice to the person affected thereby.

2. **———: ILLEGAL LEVY: INJUNCTION.** So much of the taxes as are levied upon the valuation above that fixed by the county assessor is void, and its collection may be enjoined.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed with directions.*

Francis A. Brogan, for appellant.

Benjamin S. Baker, George A. Magney, W. C. Lambert and *Charles Haffke, contra.*

William Baird & Sons, amici curiæ.

BARNES, J.

This was a suit in equity to enjoin the county treasurer of Douglas county from attempting to collect certain taxes alleged to have been assessed and levied upon the west half of lot 4, in block 118, in the city of Omaha. A demurrer to plaintiff's petition was sustained; he refused to further plead; his action was thereupon dismissed, and he has brought the case here by an appeal.

It was alleged in the petition, in substance, that the county assessor of Douglas county, on the second Monday in June, 1912, completed his assessment rolls of the taxable property in said county and filed the same with the county clerk, and by his assessment valued the west half of lot 4, block 118, in the city of Omaha, at the sum of $170,000; that thereupon said valuation became and was the only lawful valuation of said property for taxation unless and until the same was changed by the county board of

equalization in the manner provided by law. It was further alleged that the county board of equalization of Douglas county convened on the 11th day of June, 1912, adjourned from day to day, terminated its session on the 3d day of July of that year, and adjourned to await the action of the state board of equalization; that at the close of the said meeting the said county board of equalization immediately before adjournment pretended to adopt a resolution purporting to raise the valuation of the plaintiff's premises, for the purposes of assessment, from the sum of $170,000 to the sum of $180,000, thereby making an increase in the valuation of said property, for the purposes of assessment and taxation, of $10,000; that the action taken by the said board was taken without any notice to the plaintiff, although he resided in the city of Omaha and was actually in said city at the time, which fact was well known to the said board, and no attempt was made to give plaintiff notice of the action of the said board, and, without giving him any opportunity to appear before the board and show cause why said valuation was excessive, and by adjourning the said meeting, prevented a hearing on their said action. It was alleged that the action of the board of equalization was contrary to the terms of the statute and without authority of law, and was wholly null and void; that said increased valuation was reported to the state board of equalization; that said state board certified the increase to the county clerk of Douglas county; that taxes were levied on such increased valuation and were extended upon the tax lists of said county, and that the county treasurer was proceeding and attempting to collect the said taxes. Plaintiff offered to pay all taxes levied on the true valuation of $170,000, and prayed for an injunction restraining the county authorities from collecting or attempting to collect so much of the taxes as were assessed and levied upon the increased valuation of $10,000. In short, the petition stated sufficient facts to entitle the plaintiff to the relief prayed for, if the action of the board of equalization in increasing the valuation of plaintiff's property was void and was taken without authority of law.

The proceedings, of which complaint was made, were had under the provisions of the Compiled Statutes of 1911. By section 116, art. I, ch. 77, Comp. St. 1911, it was provided: "The precinct assessors shall complete their assessment rolls, schedules, lists and returns, and deliver the same to the county assessor for revision, not later than the last Monday of May in each year. The county assessor shall complete his revision of the same and shall file them with the county clerk on or before the second Monday of June of each year." It was provided by section 120: "The county board, the county assessor and county clerk, shall constitute the county board of equalization, and the county clerk shall be the clerk of said board." By section 121, it was further provided: "The county board shall hold a session of not less than three and not more than twenty days for the purpose contemplated in this section, commencing on the first Tuesday after the second Monday of June each year, and shall: First. Fairly and impartially equalize the valuation of the personal property of the county, and to that end shall, on the application of any person who may deem himself aggrieved, or who shall complain that another is assessed too low, review the assessment and correct the same as shall appear to be just. Second. At its meeting in 1912, and every second year thereafter, equalize the valuation of real property of (the county) by raising the valuation of such tracts and lots as are assessed too low, and by lowering the valuation of such tracts and lots as are assessed too high; but in cases of evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property the county board of equalization may at any of its annual meetings consider and correct the same by raising after due notice has been given to the interested party or parties or by lowering the assessed valuation of such real property. * * * Third. Ascertain whether the valuation in one township, precinct or district bears just relation to all townships, precincts, or districts in the county; and may increase or diminish the aggregate valuation of property in any township, precinct or district, by adding or deducting such sum upon the hun-

dred as may be necessary to produce a just relation between all the valuations of the property in the county. It may consider lands, village and city lots and personal property, and different classes of personal property, except property assessed or valued by the state board of equalization and assessment, separately and determine a separate rate per cent. of addition or reduction for each of said classes of property as may be necessary to adjust the equalization thereof. Fourth. Adjust assessments for the county by raising or lowering the assessment of any person as to any or all the items of his assessment in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value. But in no case shall the assessment of any person be raised by the board until such person, or his agent, shall be previously notified, if such person or his agent be found in the county. Fifth. Also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof as the assessors should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county."

It appears that the assessed valuation of plaintiff's property was raised in the amount of $10,000, without any notice to him whatever, and without any complaint made by any one that his property was assessed too low. It also appears, and is admitted by the demurrer, that the board of equalization increased the valuation of the plaintiff's property as the last act performed by it before adjournment, and that plaintiff never had any notice of such increase until after such adjournment, and was afforded no opportunity to appear before the board and show cause why such increased valuation should not be made.

It is the plaintiff's contention that the district court erred in sustaining the demurrer to his petition and dismissing his cause of action. The county board of equalization can only exercise such powers as are expressly granted by statute, and when the law prescribes the mode they must pursue in the exercise of these powers, it excludes

all other modes of procedure. *Sioux City & P. R. Co. v. Washington County,* 3 Neb. 30. The board of equalization is simply what its name imports, a board for the equalization of values in certain cases. It possesses no powers save those conferred by statute. *State v. Dodge County,* 20 Neb. 595. A county board cannot change an assessment without notice having first been given to the party affected. *State v. Edwards,* 26 Neb. 701; *Grant v. Bartholomew,* 57 Neb. 673. In the case last cited it was said: "A board of county commissioners, sitting as a board of equalization, without notice to the landowner and without a complaint that his real estate was assessed too low, raised the value placed thereon by the assessor. Held, that the board was without jurisdiction and its action a nullity." Where an assessment has been duly made and returned, the property owner may rest securely upon such assessment, unless a complaint is filed against him before the board of equalization and evidence given in support of the complaint, tending to show that his assessment should be increased. *Dixon County v. Halstead,* 23 Neb. 697. The valuation of property made by the proper assessing officer is presumed to be correct, and the burden is upon those attacking the same before the board of equalization to show that it should be assessed at a higher rate. *Woods v. Lincoln Gas & Electric Light Co.,* 74 Neb. 526. In *Grant v. Bartholomew, supra,* it was held that, where a board of equalization illegally raised an assessment, "only so much of the tax as arose out of the difference between the valuation placed upon the property by the assessor and the value attempted to be placed thereon by the board of equalization is illegal." It was also held that the action of the board of equalization in raising the assessor's valuation without notice to the landowner does not vitiate the assessment made by the assessor. In *Spiech v. Tierney,* 56 Neb. 514, it was held: "Where a board of equalization, without authority, increases the valuation of real estate as fixed by the assessor, the taxes apportioned against such real estate will be valid only to the extent that they are based on the original assessment." Many other cases have been de-

cided by this court along the same line, which we deem it unnecessary to refer to.

It is contended by the appellee that plaintiff's remedy in this case was by appeal from the action of the board of equalization, and not by injunction. It is apparent from the allegations of the petition that an appeal would have afforded the plaintiff no remedy. No opportunity was given him to make complaint and have a hearing before the board of equalization. We have frequently held that, on appeal from an order of the board of equalization in the matter of assessment of property for taxation, the cause must be tried on the questions raised by the complaint before that tribunal. *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405; *First Nat. Bank v. Webster County*, 77 Neb. 813; *State Bank v. Seward County*, 95 Neb. 665.

As we view this question, the contention that the Statutes of 1911 gave to the board of equalization the enlarged power which authorized it to increase the valuation of the property of the individual taxpayer without complaint and without notice is unsound. The court erred in sustaining the demurrer to plaintiff's petition and dismissing his action.

The judgment of the district court is reversed and the cause remanded, with directions to award the plaintiff the relief prayed for in his petition.

REVERSED.

SEDGWICK, J., concurs in the conclusion.

HAMER, J., not sitting.

ANNIE KUYKENDALL ET AL., APPELLANTS, V. DOUGLAS COUNTY ET AL., APPELLEES.

FILED MAY 1, 1915. No. 18147.

The opinion in *Brown v. Douglas County, ante,* p. 299, is followed and approved.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed with directions.*

Brogan & Raymond, for appellants.

George A. Magney, Benjamin S. Baker, John A. Rine, W. C. Lambert, L. J. TePoel and *Charles Haffke, contra.*

BARNES, J.

This was an action to restrain the collection of that part of the taxes assessed and levied on an increased valuation of plaintiff's real estate in Douglas county, situated in the city of Omaha.

The facts alleged in the petition were identical with those contained in the opinion in *Brown v. Douglas county, ante,* p. 299, except as to the description of the premises and the amount of increased valuation. A demurrer to plaintiff's petition was sustained by the district court and plaintiff's action was dismissed. The appeal in this case is ruled by our opinion in *Brown v. Douglas County, ante,* p. 299.

The judgment of the district court is reversed, with directions to grant the plaintiff the relief prayed for in her petition.

REVERSED AND REMANDED.

HAMER, J., not sitting.

WILLIAM H. BEDELL ET AL., APPELLEES, V. WILLIAM BERGER ET AL., APPELLANTS.

FILED MAY 1, 1915. No. 18140.

Evidence examined, and found sufficient to sustain the judgment.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Rhea & Hanlen, for appellants.

E. A. Cook, contra.

BARNES, J.

This was an action in the district court for Dawson county for damages for a breach of defendants' contract to convey to plaintiff a good title to lot 3, in block 5, of Ehmens subdivision to the city of Gothenburg, in Dawson county, Nebraska. The plaintiff recovered judgment for $290.58, and the defendants have appealed.

It appears that the plaintiff and the defendants entered into a written contract by which the defendants, upon the payment of the purchase price, agreed to convey the lot above described to plaintiff. Plaintiff went into possession of the lot and made all of the payments but one, when it was discovered that defendants did not have title to the lot and could not make the conveyance. The evidence shows that plaintiff made frequent demands upon the defendants to complete their title and convey the lot to him, but defendants neglected and refused so to do; that thereupon the plaintiff proceeded to secure the outstanding title at an expense of over $300. The defendants refused to reimburse him for the money so expended.

There is no substantial conflict in the evidence, and the judgment of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

P. F. BROPHY, APPELLEE, V. FAIRMONT CREAMERY COMPANY, APPELLANT.

FILED MAY 1, 1915. No. 18042.

1. **Corporations: SERVICE OF SUMMONS: "MANAGING AGENT."** An agent of a domestic corporation, whose principal place of business is in another county in this state, whose contract of employment demands of him the exercise of judgment and discretion in the business affairs of his principal, and who has charge of the property and business of his principal in the locality where he is stationed, is "a managing agent," upon whom service of summons may be made.
2. **Landlord and Tenant: DESTRUCTION OF PREMISES: LIABILITY OF TENANT.** A tenant may, if guilty of negligence in their care, be liable to his landlord for the loss of the leased premises by fire, even though the lease contains a provision that at the end of the term he shall yield possession "subject to loss by fire."

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Hainer & Craft, for appellant.

George W. Berge, contra.

LETTON, J.

Action for damages by a landlord against a tenant for the negligent destruction of the leased premises by fire. Plaintiff recovered, and defendant appeals.

Plaintiff was the owner of a one-story frame store building in Panama, Nebraska, which was leased to defendant for a year. Defendant was largely engaged in the business of purchasing butter, eggs, poultry and cream, and the building was used as one of its purchasing stations. The petition charges, in substance, that on account of the carelessness and negligence of the agents of the defendant while acting within the scope of their employment the building caught fire and was totally destroyed; that there was no insurance on the building, and that the same was a total

loss, and the plaintiff has been damaged in the sum of $1,000.

The first defense is that the court had no jurisdiction, for the reason that defendant is a Nebraska corporation having its principal place of business in Douglas county; that it has no place of business in Lancaster county nor managing agent therein; and that Samuel Johnson, upon whom the summons was served, was not its managing agent nor an officer of defendant, but a mere laborer.

For a second defense it pleads a provision of the lease by which it took the building subject "to the usual wear, inevitable accident, and loss by fire," and denies that it was guilty of negligence.

1. The evidence shows that the business at Panama was supervised by a manager at Crete, Nebraska. The duties of the person in charge at Panama were to purchase cream, butter, poultry and eggs, to pack or crate the purchases, and to ship according to defendant's directions. The prices to be paid were fixed at headquarters and communicated to the buyer at Panama. Poultry was graded as to age and size. When a farmer brought poultry to the substation, it was the duty of the buyer to fix the grades of the fowls tendered and to pay for them at the prices fixed. It was also his duty to test all cream taken in and to pay for it according to the result of the test. Payment was made by drafts drawn upon the Fairmont Creamery Company, payable to the seller, and signed by the person in charge "for the Fairmont Creamery Company." The drafts were usually cashed at the local bank. Under this state of facts the conduct of the business required judgment and discretion, and under our former holdings Johnson was the managing agent of defendant at Panama. Service was properly had upon him. *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 14; *Ord Hardware Co. v. Case Threshing Machine Co.*, 77 Neb. 847.

2. It is difficult to determine the cause of the fire. Plaintiff claims that there is sufficient circumstantial evidence to sustain a finding that the fire occurred on account of the carelessness of the agent of defendant in charge of its busi-

ness there, which, of course, defendant denies, and on its part insists that the evidence is not sufficient to sustain the verdict. It also contends that the court erred in admitting testimony as to various statements made before and after the fire by Baker, the man in charge of the business. It is argued that these statements were no part of the *res gestæ*, and therefore inadmissible. Our attention is called to the case of *Ohio & M. R. Co. v. Stein*, 133 Ind. 243, 19 L. R. A. 733, where it was held that, where certain evidence was erroneously admitted, it should be presumed to be prejudicial, and, unless this presumption was rebutted, the judgment should be reversed. This is not the rule in this state, and is directly opposed to section 7713 Rev. St. 1913. The statements of Baker as to which the most serious complaints are made are admissible, for the reason that they were declarations of the agent concerning his conduct, and were so closely connected in time with the acts charged as negligence that they must be considered as a part of the *res gestæ*.

The conversation had with the witness Snyder, which was had the day before the fire started, is relevant and material, not on account of its being an admission concerning any act of Baker's or a threat, but merely as indicating a negligent and careless state of mind on his part. Its value as evidence was for the jury.

The statement made to Johnson two or three days after the fire was in the main self-exculpatory and could not be prejudicial. The other part of the statement, that Baker remembered candling the eggs, could not be prejudicial, since it was undisputed that Baker had said at the time he left the store, a few minutes before the fire, that he had done so.

It is next assigned that plaintiff's counsel was guilty of improper conduct because he commented upon the absence of Mr. Baker as a witness. This was within the limits of legitimate argument. The absence of a material witness may usually be commented upon.

It is a close question whether the evidence is sufficient to sustain the verdict; and yet, when the whole testimony

is taken together, there are a number of circumstances which seem to justify the jury in finding that the negligence of Baker was the cause of the fire. We do not feel justified in setting aside the verdict for the reason that it is not sustained by the evidence.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissents.

FAWCETT, J., not sitting.

JOSEPH A. WYNEGAR, APPELLANT, V. GEORGE DOBSON ET AL., APPELLEES.

FILED MAY 1, 1915. No. 18103.

Appeal in Equity: AFFIRMANCE. In an action in equity, where the evidence is conflicting, the findings of the trial court, based upon the testimony of witnesses who appeared in person before it, are entitled to consideration, and may, in a doubtful case, determine whether the plaintiff has sustained the burden of proof necessary to entitle him to the relief prayed.

APPEAL from the district court for Butler county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

C. M. Skiles, for appellant.

Matt Miller, contra.

LETTON, J.

Action to quiet title. Defendants prevailed, and plaintiff appeals.

The petition, in substance, alleges that on July 1, 1902, one McCarty, a resident of Lincoln, owned five lots in the village of Ulysses, Butler county; that on that day he executed a quitclaim deed to Godfrey Rihart; that Rihart paid $5 down, and was to pay the balance of the purchase price, amounting to $10, within 60 days from date; that the deed was placed in the hands of one Lord, with the agree-

ment that if the balance was not paid within that time the deed was to be returned to the grantor, and the $5 paid considered as rent; that Rihart failed to pay the amount, and his interest in the property was thereby forfeited; that a long time afterwards, and after Rihart ceased to claim any interest in the lots, McCarty and his wife executed a warranty deed of the premises to Joseph A. Wynegar, the plaintiff, and delivered it to defendant Dobson, with instructions to deliver it to plaintiff; that Dobson failed so to do; that afterwards Dobson, without authority, obtained possession of the quitclaim deed to Rihart, and that Rihart executed and delivered to him a quitclaim deed on the 2d of January, 1908; that both of these were recorded, and both defendants knew at the time of these transactions that the plaintiff was the owner of the premises; that afterwards McCarty executed and delivered to plaintiff another warranty deed on the 28th day of April, 1909, which was recorded after the other deeds. The petition alleges that the plaintiff went into possession of the premises by virtue of the deeds made by McCarty and has ever since been in possession.

The answers deny that the deed to Rihart was placed in escrow with Lord, allege that Rihart purchased the lots for the sum of $25, and under the agreement made took possession of the same, fenced them, and continued in possession from 1897 till about the 2d of January, 1908; that the deed from McCarty to Rihart was placed in escrow in the hands of the First Bank of Ulysses, to be held until he paid the balance due; that Rihart paid $10 on the deed at the time of purchase, afterwards paid the balance, and the deed was delivered to him by the bank; that he afterwards conveyed the premises to defendant Dobson; that the conveyance from McCarty to Wynegar was made with full knowledge that Rihart was the owner and in possession of the lots, and that the recording of that deed creates a cloud upon defendants' title. There is a prayer for affirmative relief.

The evidence on behalf of each party sustains, in the main, his respective plea. There is a direct conflict in the

testimony, and there is very little evidence as to the surrounding circumstances which aids the court in determining the truth or falsity of the several stories. The evidence of Mr. Lord was not taken, and McCarty and Rihart flatly contradict each other as to the original agreement. Wynegar procured possession from Rihart by agreement. It was asserted that Rihart disclaimed ownership more than once, but this he denies. The trial court had the advantage of seeing the witnesses and hearing them testify, and its judgment as to their credibility is worthy of consideration.

It was for the plaintiff to sustain the burden of proof. We are unable to say that he has done so by a preponderance of the evidence, especially in view of the result reached by the district court. This being the case, the judgment of the district court should be, and is,

AFFIRMED.

FAWCETT, SEDGWICK and HAMER, JJ., not sitting.

WILLIAM HAUENSTINE, APPELLANT, V. FLORA I. BARNETT, APPELLEE.

FILED MAY 1, 1915. No. 18110.

1. **Appeal: HARMLESS ERROR.** One cannot complain of the giving or refusing of instructions upon an issue of settlement, where the finding of the jury that no settlement took place is in his favor.
2. **———: ISSUES.** Where a general denial has been filed in a justice court to an action for wages, an answer in the district court on appeal alleging facts tending to contradict the allegations of the petition that there is a balance due does not change the issues tried below.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

S. D. Killen, for appellant.

Sackett & Brewster, contra.

LETTON, J.

Action to recover a balance alleged to be due for wages. Plaintiff recovered a judgment for the sum of $1, and has appealed. The action was originally brought in justice court. In the bill of particulars plaintiff sued for $138.40 "as money due and unpaid on account of work and labor done and performed for defendant at defendant's request," attaching an itemized statement amounting to $678.45, and not itemizing any credits.

The answer in that court pleaded, first, a settlement; and next a general denial. When appealed to the district court a petition was filed which pleaded a specific agreement in detail. For answer the defendant denied that she entered into an agreement as set forth, but alleged that the plaintiff was employed by her from January 1, 1909, to February 15, 1909, at $50 a month; from February 15, 1909, to June 1, 1909, at $65 a month; from June 1, 1909, to November 11, 1909, at $50 a month; and that she had paid plaintiff $569.16 in full of all services, and pleaded a satisfaction and discharge.

The brief of appellant is not prepared in accordance with rule 12 (94 Neb. XI) of this court. The court is therefore under no duty to consider it; but it sufficiently appears that error is assigned upon the overruling of a motion to strike part of the allegations of the answer, because it sets up new issues from those tried below, and that complaint is made as to instructions of the court with reference to the plea of accord and satisfaction.

The evidence was in direct conflict; plaintiff testifying that he was to receive $65 a month until September 1, and $75 a month thereafter. Defendant testified he was to receive $65 indefinitely, and that on June 1 his wages were reduced to $50, at which wage he continued to work, and that he has been paid all that was due. The jury found for plaintiff, and assessed his recovery at the sum of $1. The instructions complained of relate to the matter of settlement. Since the jury found there was no settlement, no prejudice to the plaintiff could result from the giving of these instructions.

The only question presented of any moment is whether the court erred in refusing to strike part of the allegations in the answer as raising a new issue from that tried in justice court. The petition filed by plaintiff in the district court pleaded a contract in more specific terms than that filed in the justice court. The answer met the more specific allegations by entering into equal detail. No answer is required in justice court, and an answer in district court alleging facts tending to contradict the allegations of the petition that there is a balance due, though in greater detail than that filed below, does not change the issues.

The main issue was a question of veracity between the plaintiff and the defendant. This has been settled by the jury, and we are not entitled to interfere.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

LOUIS LOEB, ASSIGNEE, APPELLANT, V. ESTATE OF THOMAS HUSTON, APPELLEE.

FILED MAY 1, 1915. No. 18113.

1. **Partnership: JUDGMENT: ASSIGNMENT BY SURVIVING PARTNER.** On the dissolution of a partnership by the death of one of its members, the control of the assets vests in the surviving partner. He has power to assign a judgment belonging to the partnership, and the fact that the assignment is not executed in the name of the partnership, but only in the name of the individual partner, is not material.

2. **Executors and Administrators: PAYMENT OF CLAIM: SUFFICIENCY OF EVIDENCE.** Evidence set forth in the opinion *held* sufficient to sustain the defense of payment.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

J. E. Willits, for appellant.

Snider & Bruckman, contra.

LETTON, J.

A claim was filed by Louis Loeb, assignee, in the county court of Adams county against the estate of Thomas Huston, deceased. The claim consisted of a judgment rendered against the deceased on October 10, 1888, for $229.57, including costs and interest, upon a note given by one Alexander Rutherford to Huston, and afterwards indorsed in blank by Huston. Rutherford was not made a party, and the judgment was against Huston as indorser. The action was brought by "Abraham Loeb and Emil Lindner, administrator of the estate of Samuel Hirsch, deceased, doing business under the firm name of Loeb & Hirsch." The assignment is as follows: "In the County Court of Adams County, Nebraska. Abraham Loeb and Emil Lindner, Adm'r of the Estate of Samuel Hirsch, deceased, Plaintiffs, v. Thomas Huston, Defendant. Assignment of Judgment. For a valuable consideration I hereby assign the judgment rendered in the above entitled case in the county court of Adams County, Neb., on the 10th day of Oct., 1888, the amount of said judgment being $229.57, and the costs being $4.25, and which said judgment is recorded in county court docket 3, at page 205, to Louis Loeb. Witness my hand this 26th day of March, 1900. Loeb & Lindner, by A. Loeb."

The claim was allowed in the county court, but an appeal was taken to the district court, where issues were properly framed. The petition alleged that Abraham Loeb is the surviving partner of Loeb & Hirsch, a copartnership, and that the judgment vested in him as such surviving partner, with power to dispose of the same; that Lindner was a nominal party only, and has since made his final report; that Abraham Loeb is the real party in interest; and pleads the assignment and the nonpayment of the judgment. The defendant denied the assignment of the judgment; pleaded that the judgment was dormant, that it is barred by the statute of limitations, and that it was fully paid. The case was tried to the court without the

intervention of a jury. The court found that the execution of the assignment was not sufficient to vest the title in Louis Loeb, and also found generally for the defendant and against the plaintiff. Judgment was rendered dismissing the case.

Plaintiff proved the judgment and the execution of the assignment by Abraham Loeb. For the defense it was shown that a claim was filed by Abraham Loeb against the estate of Alexander Rutherford for $275 upon the same note as that upon which the judgment is based; the note being for $200 with 10 per cent. interest from May 27, 1887. The judgment was rendered October 10, 1888. On the 12th day of October, 1889, Rutherford for a consideration of $275 executed a chattel mortgage on certain property, the name of the mortgagee being written as follows: "Loeb & Hirsch"—a line drawn through these words, and "Abraham Loeb" written directly thereafter. Rutherford on July 10, 1888, also executed another chattel mortgage to Loeb to secure $110 due the 1st day of November, 1889. There was also found among the papers of this estate a receipt dated August 19, 1890, as follows: "Received of F. J. Taylor, Adm'r of Rutherford Estate, the sum of $396.45 in notes as payment of mortgage debt. (Signed) A. Loeb." The final report of the executor shows that he was credited with this sum paid to "A. Loeb on chattel mortgage." This receipt is dated August 19, 1890, which is the day before the claim was filed, but it was not filed until August 29.

As to the question whether the assignment was sufficient to pass title to the assignee: The original judgment was in favor of Abraham Loeb and Emil Lindner, doing business under the firm name of Loeb & Hirsch. Loeb was the surviving partner of this firm, and he had the right to assign and dispose of the judgment. *Lindner v. Adams County Bank*, 49 Neb. 735. The mere fact that he also signed the name of Lindner to the assignment did not interfere with this right. Even if Lindner, as administrator, had not been entitled to do business in the name of Loeb & Hirsch, a third party cannot now complain.

We believe, however, that the evidence fails to show that this note has not been paid. The $275 claim filed against the estate of Rutherford was based upon this note. Rutherford had previously given a chattel mortgage for $275 without interest. Another chattel mortgage had been given by him to secure a note for $110. Chattel mortgages to the amount of $396.45 in favor of Abraham Loeb were paid by the administrator. The receipt, though dated before the filing of the claim, was filed afterward. Apparently the claim was dropped and the debt paid by paying the mortgages, which were not required to be filed or allowed as claims against the estate in order to warrant payment by the administrator.

No explanation of these transactions has been given by the plaintiff, though it was stated at the argument that Mr. Abraham Loeb is within reach, so that his deposition might have been taken. The amount of the first chattel mortgage does not correspond exactly with the amount due upon the note from Rutherford, but it nearly does so if interest to maturity was included, and since the note bears no interest this is probably what was done. It is worthy of remark that the claim filed by Loeb based upon the note is also for $275, and that this too exceeds the amount due at that time. When Huston died in 1911, the inventory of his estate showed that he was possessed of four lots in Hastings, a number of domestic animals in excess of his exemptions, over $1,500 in money, notes secured by real estate mortgages of record, and other tangible assets. Evidently the later executions against him had been issued and returned in a perfunctory manner in order to keep the judgment alive. No serious attempt seems to have been made to collect from Huston for many years.

Considering all the facts, we are convinced that the circumstantial evidence sustains the general finding of the district court. Its judgment is, therefore,

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CHRISTINA KRIEGER, APPELLEE, V. CHARLES VON BUSCH ET AL., APPELLANTS.

FILED MAY 1, 1915. No. 18086.

1. **Appeal: CONFLICTING EVIDENCE.** A verdict on substantially conflicting proof will not be set aside, where it is supported by sufficient competent evidence.
2. **———: EXCLUSION OF EVIDENCE: OFFER OF PROOF.** "The ruling of the trial court in sustaining an objection to a question put to one's own witness cannot be reviewed where the complaining party has failed to make an offer of the testimony indicating what he expects to prove by the witness, in response to the question propounded and overruled." *Barr v. City of Omaha*, 42 Neb. 341.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

C. R. Stasenka, B. V. Kohout and *McCreary & Danley*, for appellants.

J. W. James, contra.

ROSE, J.

This is an action to recover $172.26 for services performed by plaintiff as a domestic servant for defendants from October 8, 1908, until June 10, 1909, at $3.50 a week, including $20 for traveling expenses between plaintiff's home at Madison, South Dakota, and the home of defendants near Campbell, Nebraska. The answer contains a general denial and a plea of settlement and payment. Plaintiff recovered a verdict and a judgment for the full amount of her claim and interest. Defendants have appealed.

The principal controversy on appeal appears to involve the sufficiency of the evidence to sustain the verdict. It is established without controversy that plaintiff performed the services for which she claims compensation. There is evidence tending to show that defendants agreed to pay her $3.50 a week and her traveling expenses. On behalf

of defendants there is proof that plaintiff offered to make them a visit and to assist them for her railroad fare, and that they settled and paid her claims. On these issues there is a substantial conflict in the testimony, with sufficient evidence to sustain the verdict. The questions of fact were therefore settled by the jury.

One of the assignments relates to the exclusion of testimony in answer to questions propounded to a witness for defendants, but the record does not contain an offer of proof essential to an affirmative showing of error. It follows that the judgment cannot be reversed on this ground. *Barr v. City of Omaha,* 42 Neb. 341; *Blondel v. Bolander,* 80 Neb. 531.

Complaint is made of other rulings on evidence, but in these respects reversible error is not shown.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

SEDGWICK, J., concurring.

The rule stated in the second paragraph of the syllabus is apparently applicable in this case, because it does not appear from the record that the questions overruled call for evidence that is relevant and material to the issue that was being tried. The rule has been applied in many cases in this court, including *Mathews v. State,* 19 Neb. 330; *Masters v. Marsh,* 19 Neb. 458; *Lipscomb v. Lyon,* 19 Neb. 511; *Yates v. Kinney,* 25 Neb. 120; *Sellars v. Foster,* 27 Neb. 118; *Mordhorst v. Nebraska Telephone Co.,* 28 Neb. 610; *Barr v. City of Omaha,* 42 Neb. 341; *Blondel v. Bolander,* 80 Neb. 531, and perhaps others.

It is important to simplify the trial as far as possible. If incompetent evidence is allowed before the jury, there is always danger of an unjust verdict. When such evidence is inadvertently admitted by the court, the best that can be done is to strike it out and instruct the jury to disregard it. But this does not always remedy the error. The impression so wrongfully made upon the minds of the jurors may unconsciously influence their estimation of the competent evidence before them. If counsel are allowed

to put before the jury irrelevant or immaterial evidence, the real issue may be so incumbered as to confuse even trained and experienced minds. All such evidence tends to distract the mind and may cause neglect of the real question to be investigated. The trial court should allow only such evidence as tends legally to establish the issue presented. The examining attorney should make it appear to the trial court that the question he propounds to a witness calls for proper evidence. Unless this clearly appears, he cannot complain that the witness is not allowed to answer. But the rule should not be construed to mean that the testimony expected of the witness must necessarily be first detailed before the court.

In *Mathews v. State, supra,* the reason for the rule is correctly stated, to enable the court "to determine whether or not the evidence is pertinent." This is the only purpose of the rule, and the only justification for its existence. Opposing counsel cannot, by objecting, require the examining attorney to "make an offer of testimony indicating what he expects to prove" with each question asked of a witness. When the question itself shows that its answer would be proper evidence, that is, when the condition of the evidence is such that the court can see that the question is a proper one, under the issues, no offer of proof is necessary. The rule is more often applied in the direct than in the cross-examination of a witness. In cross-examination it will generally appear from the question itself whether the answer will be relevant to the direct examination, or will tend to explain or qualify the direct testimony of the witness, and in general more latitude is allowed in the cross-examination of a witness. When a rule of practice is announced in general terms, as in *Mathews v. State, supra,* care should be taken to limit it to its proper application. If improperly applied, such rules sometimes become more and more technical in application until they become a trap for the unwary, instead of beneficial for the promotion of justice. I think this has been the result in some of the later cases, and that the decisions in those cases ought to be explained and modified.

VIOLA KEUP, APPELLEE, V. FRED KEUP, APPELLANT.

FILED MAY 1, 1915. No. 18094.

Husband and Wife: SUIT FOR MAINTENANCE. Without seeking a divorce, a wife who has not violated any duty growing out of the marriage relation may maintain a suit in equity against her husband for separate maintenance, where he has violated his legal duty to support her and their children.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETTLER, JUDGE. *Affirmed.*

Joseph C. Saylor and *John A. Miller,* for appellant.

W. D. Oldham and *John W. Chapman, contra.*

ROSE, J.

This is a suit in equity commenced by Viola Keup against her husband, Fred Keup, for separate maintenance and for the custody of their infant son. Defendant filed a cross-petition, praying for a divorce. Each charged extreme cruelty on the part of the other. The trial court found the issues in favor of plaintiff, and required defendant to pay her $50 in cash and $15 a month until the further order of the court, or until such a time as he shall provide a suitable home for her and the child. Defendant has appealed.

On appeal it is contended that the evidence does not justify the relief granted to plaintiff, and that defendant is entitled to a divorce and the custody of his infant son. The parties lived together less than a year. Plaintiff took the child to the home of her parents and has since lived there. It is beyond question a suitable place. Nothing would be gained by recounting the unhappy incidents which resulted in the separation. The decree is sustained by the proofs. The trial court did not exact of defendant the performance of any duty beyond the marital obliga-

tions imposed upon him by law. The evidence does not show that plaintiff forfeited her right to the relief granted.

AFFIRMED.

FAWCETT, SEDGWICK and HAMER, JJ., not sitting.

RUDOLPH KROLL, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MAY 1, 1915. No. 18099.

Courts: JURISDICTION: INJURIES TO REAL PROPERTY. As a general rule, an action for injuries to real property situated in another state cannot be maintained in this state.

APPEAL from the district court for Holt county: R. R. DICKSON, JUDGE. *Affirmed.*

M. F. Harrington, for appellant.

Byron Clark, Jesse L. Root, L. C. Chapman and *J. W. Weingarten, contra.*

ROSE, J.

Plaintiff brought this action in the district court for Holt county to recover $8,520 for injuries to real estate and personal property situated in Lawrence county, South Dakota. Defendant demurred to the petition on the ground that the court had no jurisdiction of the subject matter of the suit. The demurrer was sustained. Plaintiff refused to plead further and elected to stand upon his petition. A dismissal of the action followed, and plaintiff has appealed.

The determining question is conceded to be: May an action for injury to real property situated in another state be maintained in this state? The courts of both England and America have generally answered this question in the negative. Practically the entire field of inquiry and discussion is covered by the opinions in the following cases:

British South Africa Co. v. Companhia De Mocambique, (1893) L. R. App. (Eng.) 602; *Ellenwood v. Marietta Chair Co.,* 158 U. S. 105; *Livingston v. Jefferson,* 1 Brock. (U. S. C. C.) 203; *Kentucky Coal Lands Co. v. Mineral Development Co.,* 191 Fed. 899. Many other cases are collected in 26 L. R. A. n. s. 933 *et seq.,* in a note to *Smith v. Southern R. Co.,* 136 Ky. 162. The reasons which have directed the course of adjudication generally on this subject are stated in the opinions in the cases cited. The question is not one of venue, but of jurisdiction. The action is local and is maintainable only in the state or country wherein the land is situated. In a few cases a contrary view has been expressed, the most noteworthy being *Little v. Chicago, St. P., M. & O. R. Co.,* 65 Minn. 48, 33 L. R. A. 423. According to the great weight of authority, however, the correct rule is, generally, that an action for injuries to real property situated in another state cannot be maintained in this state.

To overturn the ruling on the demurrer, plaintiff cites *Omaha & R. V. R. Co. v. Brown,* 29 Neb. 492. That was an action to recover damages for the flooding of lands situated in Nebraska. It was held, under the statute, that the action was maintainable in any county where service upon the defendant could be obtained. The decision follows *Genin v. Grier,* 10 Ohio, 209, a parallel case under the same statutory provisions. In both cases the cause of action accrued in the state in which the suit was brought. The ruling is not in conflict with the holding of the trial court in sustaining the demurrer in the present case. Notwithstanding the early Ohio case, the supreme court of that state in the later case of *Pittsburgh, C., C. & St. L. R. Co. v. Jackson,* 83 Ohio St. 13, held: "An action for trespass on lands situated in another state, or injury thereto, cannot be maintained in this state." *Genin v. Grier,* 10 Ohio, 209, and *City of Fostoria v. Fox,* 60 Ohio St. 340, were distinguished as follows: "The cases cited, like all others, should be interpreted with reference to the facts of each case and the questions presented to and considered by the court. In those cases the question now before this

court did not arise. In both cases the cause of action asserted accrued within this state, and the question of conflict of jurisdiction between the courts of this state and the courts of another state did not arise upon the record and was not considered by the court. In each case the question was: Which county in this state was the proper forum for the action." *Pittsburgh, C., C. & St. L. R. Co. v. Jackson*, 83 Ohio St. 13.

For the same reasons, *Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492, on the subject of venue and jurisdiction, is distinguishable from the present case. The statute construed in the earlier case was amended in 1889 by inserting the following: "All actions to recover damages for any trespass upon, or any injury to, real estate shall be brought only in the county where such real estate is situated." Laws 1889, ch. 29. Under the statute as thus amended, it was held in *Dhooghe v. Chicago, R. I. & P. R. Co.*, 91 Neb. 613, that an action to recover damages caused by the flooding of real estate must be brought in the county in which the land is situated. While the legislature in 1911 provided that, if the defendant in such an action is a railroad corporation, the suit may be brought where summons can be served, the change relates to the venue, and not to the jurisdiction of the action. Laws 1911, ch. 167.

It follows that the judgment of the trial court is right and is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

RUDOLPH KROLL, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MAY 1, 1915. No. 18100.

Courts: JURISDICTION: INJURIES TO REAL PROPERTY. As a general rule, an action for injuries to real property situated in another state cannot be maintained in this state. *Kroll v. Chicago, B. & Q. R. Co.*, *ante*, p. 322, followed.

APPEAL from the district court for Holt county: R. R. DICKSON, JUDGE. *Affirmed.*

M. F. Harrington, for appellant.

Byron Clark, Jesse L. Root, L. C. Chapman and *J. W. Weingarten, contra.*

ROSE, J.

Plaintiff brought this action in the district court for Holt county to recover $3,331 for injuries to real estate and personal property situated in Lawrence county, South Dakota. Defendant demurred to the petition on the ground, among others, that the court had no jurisdiction of the subject matter of the suit. The demurrer was sustained. Plaintiff refused to plead further and elected to stand upon his petition. A dismissal of the action followed, and plaintiff has appealed.

The decision is controlled by the case of *Kroll v. Chicago, B. & Q. R. Co., ante,* p. 322. For the reasons therein stated, the judgment is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

CHARLES S. FOSS, APPELLEE, V. ROY R. HAZEN, APPELLANT.

FILED MAY 1, 1915. No. 18115.

Appeal: CONFLICTING EVIDENCE. Where there is a substantial conflict in the proofs on controverted issues, a verdict responding thereto will not be set aside for insufficiency of the evidence, unless clearly wrong.

APPEAL from the district court for Boyd county: R. R. DICKSON, JUDGE. *Affirmed.*

Burkett, Wilson & Brown and *D. A. Harrington,* for appellant.

John A. Davies, contra.

ROSE, J.

This is an action for money had and received, the amount demanded being $300 and interest from March 22, 1909. The answer is a general denial. A verdict was rendered in favor of plaintiff for $372.89, and from a judgment thereon defendant has appealed.

The principal assignment of error is that the verdict is not supported by the evidence. It is shown without dispute that defendant drew a sight draft on plaintiff March 22, 1909, for $600, and that it was presented and paid. Half of that sum was afterward returned to plaintiff. On his behalf there is testimony tending to prove that the parties, for his benefit, had been negotiating for an equity in a quarter section of land in Boyd county for $600; that he was called to the telephone March 22, 1909, from defendant's office, was told that the owner of the land wanted to close the deal, and was asked if a sight draft for $600 would be accepted; that plaintiff consented to honor it; that defendant afterward took the deed in his own name as grantee, and never transferred the title to plaintiff. On the other hand, there is testimony tending to show that the negotiations resulting in plaintiff's payment of the sight draft were conducted on behalf of defendant's brother; that it was the latter who had paid plaintiff $300, and that there had been subsequent demands upon him by plaintiff for the payment of the remainder. The evidence, though conflicting, is sufficient to sustain findings in favor of plaintiff on the issues of fact. They are therefore settled by the verdict.

Exclusion of a letter offered in evidence is challenged, but its relevancy and error in excluding it are not affirmatively shown.

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

GEORGE W. BELL, APPELLEE, V. SAMUEL LOOKER, APPELLANT.

FILED MAY 1, 1915. No. 18135.

Estoppel: CONVEYANCES: PRIORITIES. An owner who conveys realty by metes and bounds and transfers machinery thereon by a separate bill of sale, taking from the purchaser a mortgage describing the property named in the deed, may be estopped to claim that the machinery is part of the real estate incumbered by the mortgage, as against mortgagor's purchaser who was led to believe that the machinery was free from incumbrance.

APPEAL from the district court for Boyd county: R. R. DICKSON, JUDGE. *Reversed and dismissed.*

John A. Davies and *H. F. Barnhart,* for appellant.

W. T. Wills, contra.

ROSE, J.

This is an application for an injunction to prevent defendant from removing electrical machinery from a flour-mill site at Lynch, and from selling property already removed therefrom. Plaintiff is the holder of a mortgage on the real estate constituting the mill property, and alleges that the electrical machinery is incumbered by his lien. After the execution of plaintiff's mortgage defendant purchased the mill and the property connected with it and removed part of the electrical machinery. He pleads in his answer that the machinery in controversy is personal property; that it is free from plaintiff's lien; that plaintiff treated it as personalty, having transferred it by bill of sale; that defendant acquired it as such; and that plaintiff is estopped to assert the contrary. From a decree granting an injunction, defendant has appealed.

The question presented by the appeal is whether the electrical machinery, as between the parties hereto, is part of the real estate upon which the mortgage is a lien. Plaintiff argues the affirmative, and defendant the negative.

Formerly the realty consisted of the mill site and a flour-mill operated by water power. Twelve years after the construction of the flour-mill the owner built an addition and equipped it with dynamos, switchboard, transformer, and other electrical devices. The electric plant was used for lighting purposes in Lynch. It also furnished light for the flour-mill. In 1909 the mill-owner by warranty deed conveyed the property to plaintiff's wife, describing the realty by metes and bounds. Later plaintiff demanded and secured for his wife a bill of sale covering the personalty, including the electrical apparatus. He and his wife, February 7, 1910, conveyed the mill property to C. A. Kurpgeweit, who subsequently executed in favor of plaintiff a purchase money mortgage; both instruments describing the realty by metes and bounds. As a part of the transaction resulting in the conveyance to Kurpgeweit, and for the same consideration, plaintiff executed and delivered to the puchaser a bill of sale covering the personal property, including the electrical machinery. Subsequently Kurpgeweit by warranty deed and bill of sale transferred to defendant the mill property and electric plant. The evidence shows that the electrical machinery can be detached without material injury to the remaining property. The owners and lienors could by agreement or mutual understanding or conduct treat the movable property in controversy either as personal property or as real estate. The controversy in this case does not arise between mortgagor and mortgagee, but between the latter and a purchaser in good faith.

In the deeds the realty was described by metes and bounds and included appurtenances, but the electrical machinery was not specifically mentioned. The bills of sale described the property in the electric plant as personalty. Defendant testified without contradiction that Kurpgeweit had said he acquired title by bill of sale and by deed, and that the realty was conveyed by deed and the personalty by bill of sale. Plaintiff himself executed and delivered a bill of sale to Kurpgeweit, defendant's transferror. In it he asserted that the property described there-

in was personalty. There is nothing to show that defendant, when he purchased the mill, had any knowledge that plaintiff considered the electrical machinery to be realty, or that the bills of sale were not what they purported to be. Defendant's uncontradicted testimony shows that in making his purchase, he considered the value of the machinery separately. As such it was unincumbered. *Fortman v. Goepper,* 14 Ohio St. 558, is an analogous case in which the effect of a deed and a bill of sale was discussed, the court saying: "The real estate, in the deed from Fortman to Hipp & Brandt, was described merely by metes and bounds. The description in the mortgage from the latter to the former was the same. The deed, bill of sale, and mortgage were executed and delivered at the same time, and each must be held to have been designed by the parties to perform its appropriate office in consummating the sale. The mortgage therefore to Fortman must be held to cover no more property than was included in the deed, and the deed not to include the property sold by the bill of sale upon a distinct consideration."

Though the bill of sale in the present case stated it was executed for "one dollar and other valuable considerations," there was in reality only one consideration for it and the deed. Since there were two separate instruments, however, one purporting to transfer personalty and the other to convey realty, the single consideration could make no difference to a third person who was without knowledge of that fact. *Zeller v. Adam,* 30 N. J. Eq. 421.

To repeat, the electrical machinery could be detached without material injury to the remaining real estate. Owing to its nature it could properly be bought, sold and held as personalty. Defendant purchased it as such. The defense of estoppel is established by uncontradicted evidence. It follows that the mortgage on the real estate is not a lien on the machinery in the hands of defendant. The decree granting the injunction is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

DALBERT SIMPSON, APPELLEE, v. WILLIAM F. GERNANDT, APPELLANT.

FILED MAY 1, 1915. No. 18087.

1. **Partnership: EXISTENCE OF PARTNERSHIP: PROOF.** In an action alleging a partnership and for a dissolution and accounting, the burden of proof is upon the plaintiff. If the existence of a partnership is denied by defendant, and there is no proof that any certificate of partnership has been filed, nor any account or inventory taken of the assets or liabilities of the business, and the defendant has paid all expenses of the business, and the plaintiff was connected with the business for only a few weeks, such circumstances tend to support the positive testimony of defendant that there was no partnership agreement between them.
2. ———: ———: **SUFFICIENCY OF EVIDENCE.** Under the circumstances shown by the evidence, it is considered that the unsupported testimony of the plaintiff is not sufficient to establish an oral agreement of partnership.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed and dismissed.*

W. H. Barnes and *Berge & McCarty,* for appellant.

Burr, Greene & Greene, contra.

SEDGWICK, J.

In 1910 the defendant was engaged in business at Fairbury, Nebraska, as an architect. He considered that his business was getting to be rather more extensive than he could manage alone, and decided to obtain some competent man to join him and assist in the business. Through a mutual acquaintance a correspondence was started between the plaintiff and defendant, and the plaintiff came to Fairbury and went to work in the defendant's office. They had some conversation in regard to the matter, and it was agreed between them that the plaintiff, from the time that he began work in the latter part of January, should be paid $24 a week. The plaintiff testified that it was agreed that they should be partners in this business,

and at the end of a year these payments of $24 a week which he would have received were to be deducted from his one-half of the net proceeds of the business, and he was to be paid the remainder. The defendant denies that there was any agreement of partnership, and says that the agreement was that the plaintiff should continue in the work, and if at the end of the year he was satisfactory to the defendant as a partner he should have one-half of the net proceeds of the year's work, from which the $24 weekly payments should be deducted. The plaintiff had been working in the office of a firm of architects in Kansas City, and had a family and no means. The defendant assisted him in obtaining $150 to pay the expense of removing his family to Fairbury and establishing them in housekeeping. After the plaintiff had been in the office several weeks, the defendant prepared a memorandum of contract in accordance with the terms of their agreement, as testified to by him. This was not satisfactory to the plaintiff, and the defendant then told the plaintiff that he was discharged, and the plaintiff insisted that there was a partnership between them and he could not be thus discharged. Afterwards the plaintiff brought this action in the district court for Lancaster county, alleging that there was a partnership between them, and asking an accounting and judgment for $3,000, as the value of his interest in the partnership. There was a trial, finding and judgment in favor of the plaintiff, which was afterwards set aside and a new trial granted, and upon the second trial there was a finding and judgment for the plaintiff, and the defendant has appealed.

The plaintiff insists that the action is for an accounting of the partnership business and for dissolution of the partnership, and for judgment for the balance due plaintiff upon such accounting. The amended petition alleges that the defendant wrongfully excluded the plaintiff from the business, and continues: "Plaintiff alleges that the partnership business and property of which defendant took exclusive possession, as hereinbefore alleged, consisted of a contract with the board of county commissioners of

Phelps county, Nebraska, for the furnishing of plans and specifications for the erection of a courthouse at Holdrege, Nebraska; a contract with E. B. Woods for the furnishing of plans and specifications for the erection of a store building at York, Nebraska; a contract with the school board of Osceola, Nebraska, for the furnishing of plans and specifications for the erection of a school building; a contract with Dr. Brewer for the furnishing of plans and specifications for a store building at Beloit, Kansas; completed and partially completed plans and specifications for the erection of the above-mentioned buildings; and other contracts and plans and specifications and personal property which plaintiff cannot more particularly describe, for the reason that the defendant has exclusive possession thereof and denies plaintiff access thereto. The accounts, property and business of said partnership are of the value of more than $6,000 over and above all debts and liabilities, and the plaintiff is the owner of a one-half interest therein."

None of the contracts alleged in the petition was obtained or entered into while the plaintiff was connected with the business, nor was anything realized on any of them during that time, except about $80. There is no evidence of any receipts, or of any value of anything connected with the business, except the commissions that would accrue upon two of the contracts that defendant had obtained before the arrangement with plaintiff, if those contracts were completed. There is evidence that the expense of the business would be considerable, but no evidence as to the amount of such expenses, nor as to the liabilities of the business, either when the plaintiff began or when his connection with the business was ended. The plaintiff received $246 from defendant while rendering his services. There is no evidence from which it could be found that he would be entitled to any such amount upon accounting of assets and liabilities.

The plaintiff testifies that there was a partnership between them. His testimony as to the facts from which he derives that conclusion is directly contradicted by the de-

fendant, and in most particulars also by the defendant's wife. No certificate of partnership was filed as the statute requires. There was no account taken of the assets or condition of the business. The defendant paid all expenses, including the amount agreed upon to be paid weekly to the plaintiff. No details were arranged, no inventories made or accounts kept. It seems clear that the minds of these parties never met upon any agreement of copartnership.

The judgment of the district court is reversed and the case dismissed.

REVERSED AND DISMISSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STATE, EX REL. MILDRED PARMENTER, RELATOR, v. A. C. TROUP, DISTRICT JUDGE, RESPONDENT.

FILED MAY 1, 1915. No. 18930.

1. **Mandamus: ALLOWANCE OF REMEDY.** Although the common law writ of prohibition has been abolished in this state, the duty is still imposed upon this court to prevent violation of law by inferior tribunals, and, when there is no adequate remedy in the ordinary course of the law, mandamus is the appropriate remedy.
2. **Damages: PERSONAL INJURIES: EXAMINATION OF PERSON.** In an action for damages caused by injuries to the person, the trial courts have power to order an expert examination of the person of the party injured, when the circumstances of the trial make it necessary to do so and no substantial harm can result therefrom.
3. ———: ———: ———. Such examination will not be ordered unless it clearly appears that a condition exists that can be definitely determined by such examination and cannot be satisfactorily determined without.

Original proceeding in mandamus to compel respondent to reinstate a case. *Writ denied.*

John O. Yeiser, for relator.

W. H. Herdman, contra.

SEDGWICK, J.

The relator began an action in the district court for Douglas county to recover damages for personal injuries caused, as she alleged, by the negligence of the defendant in that action. After issue was joined, the defendant therein asked for an order that the plaintiff be required to submit her person to an examination by physicians to be appointed for that purpose. The court made the order, and the plaintiff refused to comply with it, and the court therefore dismissed her case without prejudice to another action. The plaintiff then applied to this court for a writ of mandamus against the judge who made the order requiring him to reinstate her case.

The first objection is that mandamus is not the proper remedy in such case. The common law writ of prohibition is abolished in this state, but the duty is still imposed upon this court to prevent violation of law by inferior tribunals, and, when there is no adequate remedy by the ordinary course of the law, mandamus is the appropriate remedy. *State v. Graves,* 66 Neb. 17. The plaintiff is entitled to a trial of her alleged cause of action upon its merits. She believes that the law is that she is entitled to such trial without submitting to the indignity to which she so strongly objects. If she is found to be wrong as to her rights in this regard, she may elect to submit to this requirement rather than to forego her claim entirely. An appeal from this order of dismissal, even if determined in her favor, might result in such delay as to practically defeat her action. Under such circumstances appeal is not an adequate remedy. This objection therefore must be overruled.

The relator contends that the trial court has no power under any circumstances to order a party to submit his or her person to expert examination. In her brief she says: "We waive all other questions, and counsel for the clients interested in sustaining such an order, who of such necessity represents defendant, waives all collateral questions

excepting the assertion of such a power." It is seldom that this court is called upon to determine a question of more importance or upon which there is so clear and determined difference of opinion among the courts of last resort in the several states. Each side of the controversy is ably supported by cogent and exhaustive reasoning of the many courts which have considered it. The supreme court of the United States has been divided upon the question, and has convincingly presented both sides of the controversy in an opinion and a dissenting opinion. *Union P. R. Co. v. Botsford,* 141 U. S. 250, which was decided in 1891. In general, the opinions of that court declaring principles of the common law are followed with confidence by this court. The majority opinion was prepared by Mr. Justice Gray, the dissenting opinion by Mr. Justice Brewer, and concurred in by Mr. Justice Brown. In the majority opinion it is said: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. * * * The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country"—with further strong reasoning and copious citations of authorities. The opinion also contains this language: "But this is not a question which is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts under the constitution and laws of the United States." Although the opinion concludes with the

statement that "the order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States," still the statement that the federal courts are not given this power by the constitution or laws of the United States tends to relax the authority which this opinion otherwise would have as a precedent to be followed by the courts of the several states. It will also be observed that the proposition, strongly stated in this opinion, that the act of congress, which provides that "the practice, pleadings and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court," has been overruled by later decisions of that court. *Camden & S. R. Co. v. Stetson,* 177 U. S. 172. This later decision is now followed by the inferior federal courts. *Chicago & N. W. R. Co. v. Kendall,* 167 Fed. 62.

Mr. Justice Brewer, in the dissenting opinion, says: "In this country the decisions of the highest courts of the various states are conflicting. This is the first time it has been presented to this court, and it is, therefore, an open question. * * * The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the courtroom, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled." This language is followed by further reasoning which is worthy of care-

ful examination. Some of the further reasoning of Mr. Justice Brewer we desire to adopt, and therefore quote as follows: "It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case, or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries in order that the jury may be informed thereof by other than the plaintiff and his friends, and that compliance with such an order may be enforced by staying the trial, or dismissing the case." While the courts of last resort of nearly a dozen of the states of the Union have refused to indorse this reasoning, and have given reasons of undoubted force and clearness for such refusal, the courts of at least 20 of the states have reached the conclusion of Mr. Justice Brewer. The reasoning of these several courts upon either side of this question is so comprehensive and complete as to make it unnecessary for us to enter upon an extensive discussion.

The supreme court of North Dakota said: "If a court is powerless, in a case like this, to require a plaintiff to submit her injuries to the inspection of physicians, to the end that the exact truth as to their nature, effect, and possible duration may be ascertained, when she, by her suit, has made them the subject of judicial investigation, then the law would permit her to put forward just so much and such parts of the facts as, in her judgment, would benefit her case, at the expense of her adversary, and to invoke the court's aid to compensate her for an injury, through a partial and one-sided investigation. The court, under such circumstances, would become a means of accomplishing the grossest injustice." *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. Dak. 61.

The supreme court of Maryland said: "We cannot admit that the trial court has no such power in any case, for sometimes it may be apparent that a plaintiff is feigning, and has not suffered such injuries as he pretends he has sustained. Instances are not unknown to courts and counsel, who have had experience in such cases, in which jurors have been imposed on, and sometimes even reputable physicians, who have been called upon to testify on behalf of plaintiffs, have been deceived. When, therefore, the ends of justice seem to require it, there can be no valid reason why an examination should not be permitted, if seasonable application is made, and the court is satisfied that no serious physical or mental injury is likely to be done the plaintiff." *United Railways & Electric Co. v. Cloman,* 107 Md. 681.

And the supreme court of Michigan said: "The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the court, under proper restrictions; the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination where the necessities of the case are not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, or where, in the judgment of the trial court, it would not materially aid the jury. The power has been exercised in Iowa, Alabama, Arkansas, Georgia, Ohio, Missouri, Nebraska, Texas, Minnesota, Kansas, Wisconsin, and Indiana. * * * Testimony which is open to one party ought logically to be open to his opponent, if it can be obtained with due regard to decency, and in the orderly conduct of the trial." *Graves v. City of Battle Creek,* 95 Mich. 266.

The supreme court of Kansas said: "The purpose of a trial is to mete out exact justice. This cannot be accomplished when the truth is suppressed, and this may be done, if the court has not the power to ascertain what the truth is. In an action for personal injuries, the injured party may call physicians, to whom he may expose his per-

son, not for the purpose of effecting a cure, but for the purpose of using this expert testimony to assist him in the trial of his case. He may also expose the injured portion of his person to the jury, observing the rules of decency. Should the litigant be permitted to withhold the truth or the means of ascertaining what the truth is simply because, in the ascertainment of the truth, he may conceive the idea that an indignity is being offered? That is not an indignity which is not so intended. May he be permitted to present so much of the truth as he desires and as he thinks to his interest and withhold the remainder? This would certainly be his privilege if the court does not possess the power to make an order that will develop the exact truth. It is suggested by some of the authorities, which hold contrary to the views herein expressed, that the rule would operate harshly upon delicate and modest females. We think such may safely rely upon the courts of this country. An examination should not be ordered needlessly, or where there might be a shock to one's modesty or feelings of delicacy. We only decide that the court has the power; it should be exercised according to the sound discretion of the presiding judge. It is safer in the administration of justice to trust to the courts to protect the sensibilities of the parties in such examinations, so far as it is possible to do so, and beyond that to hold them subordinate in importance and sacredness to the interest of justice, than to hold that a party to a litigation has it within his power to develop so much of the facts as may appear to be to his interest and then stop the investigation." *City of Ottawa v. Gilliland,* 63 Kan. 165.

The supreme court of Indiana said: "The cases above cited as affirming the existence of the power establish the following propositions: (1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is

reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed, or fully elucidated, by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; (5) that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated, is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding." *City of South Bend v. Turner,* 156 Ind. 418.

Although the precise question here presented, whether the trial court has under any circumstances the power to order such an investigation, has perhaps never been directly and definitely considered and determined by this court, there are several cases in which expressions have been used that might be considered as indicating the opinion of the court as to the policy of our law. In *Stuart v. Havens,* 17 Neb. 211, it was stated in the syllabus that if the application is made during the trial it should be denied, and the third paragraph of the syllabus is: "If a personal examination is desired, the application should be made before the trial begins and experts agreed upon by the parties or appointed by the court." Upon the trial in that case the plaintiff was asked "to show his arm, which he claimed was injured by falling into the excavation, to the jury. This he did without objection and afterwards three physicians, who had treated the arm professionally, testified as to its condition without objection. Afterwards the defendant below asked the court below to make an order requiring Havens to exhibit his arm to four phyisicians called by him (the defendant). This the court refused to do." The opinion quotes *Sioux City & P. R. Co.*

v. Finlayson, 16 Neb. 578, as holding: "That where the request was made during the trial and it was sought to have the examination made by experts called by the adverse party, and not by those agreed upon by the parties, or appointed by the court, there was no error in denying the request." It then quotes a decision of the supreme court of Wisconsin, holding that an examination may be made during the trial, but adhering to the former decisions of the court in that regard. The opinion then says: "In any event the evidence partakes somewhat of a partisan character. To avoid this they should be agreed upon by the parties or appointed by the court, and an examination, if desired, should be made before the trial begins, although the court may permit it to be made during the progress of the trial." It was, perhaps, not necessary to determine in that case that the court may permit it to be made during the progress of the trial, or that the court has power under any circumstances to order such an examination, and yet this and other similar decisions of this court have been understood by the trial courts and by the profession generally to establish the right of the trial court to make such an order. *Stuart v. Havens, supra,* was decided 30 years ago, and since that time the trial courts have generally exercised such power. It has been understood by the courts of other states that this court has decided that our trial courts have such powers, and their decisions class Nebraska among the states so holding. In view of this long established practice in this state, and that there must otherwise often be a failure of justice, we conclude that we should recognize this power of the trial courts.

It is possible that, in some instances, a delicate and sensitive lady may suffer and endure a great wrong and injustice rather than present her cause to any court for a public investigation which would require her to allege in her petition and detail in her testimony facts in regard to the condition of her person which her sense of delicacy would forbid her doing. In such case she must elect before bringing her action whether she will bear the ills she has or fly to others that she knows not of. In bringing

her action she must declare in public fashion the conditions to be investigated, and the law requires that in any legal investigation of facts the best evidence available must be produced. She may decline to present such conditions for investigation; but, if she does bring them before the court, she cannot dictate the means of investigation by selecting such expert witnesses as she may have reason to suppose have opinions favorable to her cause, and rejecting those that might form contrary expert opinions upon ascertaining the facts. In modern times the medical profession has the benefit of skilful women physicians, and ordinarily, other things being equal, such physicians ought to be preferred when reasonably practicable, if desired by the woman to be examined.

If an application is made for the purpose of embarrassing or coercing the plaintiff, the trial court will be quick to discover that purpose, and will order it only under conditions above indicated, and when it clearly appears that a condition exists that can be definitely determined by such examination and cannot be satisfactorily determined without it.

WRIT DENIED.

WILLIAM WUNRATH, APPELLANT, V. PEOPLES FURNITURE & CARPET COMPANY, APELLEE.

FILED MAY 1, 1915. No. 18962.

1. **Appeal: FINAL ORDER.** An order vacating a judgment upon petition filed after the term at which the judgment was rendered, under subdivisions 4, 5, 6, 7, 8, 9, sec. 602, of the Code (Rev. St. 1913, sec. 8207), can only be made upon notice to the parties by service of summons or upon voluntary appearance and upon due proof. Such order is a final order and is appealable. *Johnson v. Parrotte*, 34 Neb. 26, followed. *Trimble & Blackman v. Corey & Son*, 86 Neb. 5, overruled.

2. **Judgment: VACATION: PETITION: ALLEGATION OF DEFENSE.** A petition to vacate a judgment on the ground of fraud and perjury of

the successful party in obtaining the judgment should allege that there is a meritorious defense of the action in which the judgment was obtained; but it is sufficient if there is a meritorious defense to a substantial part of the judgment.

3. **Tender:** ACTION FOR DAMAGES. When there is a definite sum justly due, notwithstanding the alleged defense, there must be a tender of the amount so due; but this rule cannot be applied in an action for damages in which there is no basis for ascertaining any definite amount that would be due if the defense pleaded is established.

4. **Appeal:** VACATION OF JUDGMENT. The trial court is given a large discretion to vacate a former judgment for fraud or perjury. This court cannot reverse such judgment unless it clearly appears that there has been an abuse of discretion by the trial court.

5. **Judgment:** VACATION: SUFFICIENCY OF EVIDENCE. The evidence is found sufficient to justify the trial court in exercising its discretion to vacate the judgment complained of.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

A. H. Burnett, Brome & Brome and *William G. Stewart,* for appellant.

Mahoney & Kennedy and *Nolan & Woodland, contra.*

SEDGWICK, J.

This plaintiff obtained a judgment against this defendant in the district court for Douglas county for damages which he alleged he had suffered by reason of the negligence of the defendant. Afterwards the defendant filed a petition in the cause asking to vacate the judgment because of fraud and perjury on the part of the plaintiff in obtaining the same. The plaintiff filed an answer to this petition, to which the defendant, with leave of court, replied, and upon trial the district court granted the relief asked for and vacated the former judgment. From this decision vacating the former judgment the plaintiff has appealed to this court.

The first question presented is as to the right of the plaintiff to appeal in a proceeding of this kind. It is contended that this is not a judgment or final order and is not

appealable. There have been in this court very many decisions of this kind passing upon, or directly or indirectly connected with, this question or questions of this nature. Some of these decisions, it must be considered, are indefinite, and others will appear, possibly, if not carefully considered, to be inconsistent. It seems to be important that the question should be carefully examined and the true rule determined and stated.

Section 314 *et seq.* of the Code (Rev. St. 1913, sec. 7883 *et seq.*) relates to the subject of new trials and defines the terms and provides when a new trial may be granted. It defines a new trial as "a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. * * * The application for a new trial must be made at the term the verdict, report, or decision is rendered." Section 602 *et seq.* of the Code (Rev. St. 1913, sec. 8207 *et seq.*) relates to the vacation or modification by the district courts of judgments and orders after the term at which they were rendered. Section 582 of the Code (Rev. St. 1913, sec. 8185) provides: "A judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court, for errors appearing on the record." Section 581 of the Code (Rev. St. 1913, sec. 8176) defines what is meant by a final order as distinguished from a judgment.

The trial court has a large discretion to grant a new trial of a case upon application made at the same term, if satisfied that an error has been committed prejudicial to a party, or that a manifest injustice has been the result of the first trial. The hearing upon the application is summary, and involves a re-examination of the facts upon which the rights of the parties ultimately depend. It may in some sense be regarded as a continuation of the hearing, and is in no sense a new action. In some states the order made upon such a motion is regarded as a final order, on the ground that it affects a substantial right of the parties. But in this state an order granting a new trial upon motion made at the term at which the judg-

ment was rendered is not appealable. It may be reviewed upon appeal after judgment therein. The proceeding to vacate a judgment at a subsequent term is entirely different from an application for new trial by motion at the term at which the judgment or order is rendered. This distinction is plainly indicated by this court in the earlier decisions.

In *Iler v. Darnell,* 5 Neb. 192, it is expressly held that an order of the district court vacating a judgment upon application made at a subsequent term is reviewable by this court. Before the present statute authorizing appeals in actions at law, the proceeding to reverse such final order was by petition in error. Now it is by appeal. In *Kruger v. Adams & French Harvester Co.,* 9 Neb. 526, decided in 1880, the court said: "This court has repeatedly held that error would lie to this court from the judgment of the district court granting a new trial on proceedings commenced after the adjournment of the term on the ground of newly discovered evidence"—citing *Iler v. Darnell,* 5 Neb. 192; *Axtell v. Warden,* 7 Neb. 186.

In *Estate of McKenna v. McCormick,* 60 Neb. 595, the law is stated in the syllabus: "An order of a probate court, entered under the provisions of subdivision 3 of section 602 of the Code of Civil Procedure, vacating an order allowing a claim against an estate made at a prior term, is appealable."

In *Johnson v. Parrotte,* 34 Neb. 26, the court said: "There is a preliminary contention raised by the defendants in error, viz., that the order setting aside the judgment and allowing a new trial on their petition is not a final order and will not be reviewed until after a second trial and judgment. This precise question was before this court in *Kruger v. Adams & French Harvester Co.,* 9 Neb. 526, in which it was held that the order allowing a new trial was a final order within the meaning of the Code. Counsel for defendants in error, however, assail the rule therein announced and ask us to overrule that case. The writer well remembers making the same contention in *Kruger v. Adams & French Harvester Co.,* but is satisfied

that the holding therein is correct and should be adhered to. The proceeding contemplated by section 318 is in the nature of an action. For instance, it is by petition filed as in other cases. Summons issues as in other cases, and the case is placed upon the trial docket and witnesses examined as in other cases. In short, it is a proceeding independent of the original action and its determination is a final order for the purpose of review by petition in error."

In *Thompson v. Sharp,* 17 Neb. 69; *Osborn v. Gehr,* 29 Neb. 661; *Lander v. Abrahamson,* 34 Neb. 553; *Janes v. Howell,* 37 Neb. 320; *Scott v. Wright,* 50 Neb. 849; *Munro v. Callahan,* 55 Neb. 75; *McGrew v. State Bank,* 60 Neb. 716; *Meyers v. Smith,* 59 Neb. 30; *Williams v. Miles,* 73 Neb. 193; *Godfrey v. Cunningham,* 77 Neb. 462; *Wagener v. Whitmore,* 79 Neb. 558; *State v. Merchants Bank,* 81 Neb. 704; *MacCall v. Looney,* 4 Neb. (Unof.) 715, and some other cases, appeals from judgments vacating former judgments, as in this case, were entertained and decided upon their merits. In some of them the judgment of the district court is reversed; in others it is affirmed; but in none of these many cases is the right to appeal before the final determination of the case in which the original judgment was rendered doubted. The fact that the former case had not been retried appeared upon the face of the record in each case and could not be overlooked. These cases must be considered as settling the question. 2 R. C. L. sec. 27, p. 44, and cases cited.

When a proceeding is begun by a petition to vacate or modify a judgment after the term at which that judgment was rendered, and evidence must be taken and a trial had upon that petition, the decision of the court is itself a judgment, within the meaning of section 582 of the Code. In such case it is not necessary to consider the definition of a final order as contained in section 581 of the Code. Moreover, the proceeding is in the nature of an action, within the meaning of section 582, and the decision therein is a final determination of that action.

The plaintiff cites several cases as holding that such judgment is not a final judgment and not appealable. In *Rose v. Dempster Mill Mfg. Co.*, 69 Neb. 27, it is said in the syllabus: "An order setting aside a judgment or decree, fixing the time for filing pleadings, and setting the cause down for a new trial, under section 602 of the Code, is not a final order from which appeal or error will lie before trial and a final judgment." It appears from the opinion that a deficiency judgment had been rendered in a mortgage foreclosure proceeding, and upon petition of the defendant the judgment was set aside, and defendant was allowed to answer. The plaintiff prosecuted a petition in error to this court, and the defendant moved to dismiss the petition in error. It is not stated whether the petition to vacate the judgment was filed during the term at which the judgment was entered, and the grounds upon which the petition was predicated are not stated in the opinion. It is, however, stated that the proceeding was under section 602 of the Code, but it is not stated under which subdivision of that section. If under the third subdivision, the proceeding is by motion, and, if the ground is that the judgment was rendered before the action regularly stood for trial, that motion must be made "in the first three days of the succeeding term." The decision in *Rose v. Dempster Mill Mfg. Co.*, is predicated on *Morse & Co. v. Engle,* 26 Neb. 247, and quotation is made from the opinion in that case. In *Morse & Co. v. Engle,* the appeal was taken from an order vacating the decree of foreclosure of mortgage. A motion was made to dismiss this appeal because the order appealed from was not final, and the motion to dismiss was overruled, and the appeal entertained. The decision was that an appeal was proper in an action in equity, and that in an action at law, under the statute as it then was, "the proper practice is by petition in error," thereby holding that, in any event, the order would be reviewable before the final determination of the main action. *Cockle Separator Mfg. Co. v. Clark,* 23 Neb. 702, is also cited in *Rose v. Dempster Mill Mfg. Co.* In that case the rule is stated to be: "An order of the district court setting aside

a decree and permitting a defendant to plead to an answer filed by a codefendant, by leave of court, but of which said defendant had no notice, is not a final order." The opinion attempts to distinguish *Spencer v. Thistle,* 13 Neb. 227, and attempts to show that the judgment vacated in *Spencer v. Thistle* was wrong, so that the district court in entering the original judgment exceeded its jurisdiction; its judgment was therefore void, and it did right in setting it aside. But the opinion concludes that when a decree is entered against a defendant without service, and a motion to vacate is made within two days thereafter, and is granted and issues then made up, such order vacating the judgment and making up the issues is not a final order. This case does not hold that every judgment vacating a former judgment under section 602 is interlocutory and unappealable. While the decision in *Rose v. Dempster Mill Mfg. Co.* is probably right, and the language of the syllabus is broad and comprehensive, it does not seem to be authority upon this question.

In *Merle & Heaney Mfg. Co. v. Wallace,* 48 Neb. 886, judgment was entered on a power of attorney. The attorney who appeared and answered for the defendants had no authority other than was conferred by the note itself. The motion to set aside the judgment was made at the same term at which the judgment was rendered. The proceeding in error to this court was dismissed because the cause had not been disposed of in the district court. The order of the district court having been made upon a motion at the same term at which the judgment was rendered, the decision follows the universal rule in this state. The language, however, of the syllabus and some parts of the opinion was so broad as to affect cases not before considered to be within the rule, and afterwards in *Browne v. Croft,* 3 Neb. (Unof.) 133, the syllabus was restated and not accurately applied to the facts in the case then considered. In *Browne v. Croft* there was a decree in the district court foreclosing certain tax liens. Afterwards, whether at the same term or the subsequent term does not appear from the opinion, a petition was filed in the district court

"for an order vacating the judgment and granting a new trial because of unavoidable casualty depriving the petitioner of an opportunity to defend." This petition was granted, and the plaintiff appealed from the order granting the petition. There was a motion in this court to dismiss the appeal, and in the first opinion by Mr. Commissioner Ames the appeal was dismissed because the proceeding to vacate the judgment "is purely statutory and presents no matter of equitable cognizance;" that is, the proceeding to vacate the judgment in the district court was considered as an independent action under a statutory provision, and therefore not equitable in its nature. Of course, if the petition to vacate the judgment was made at a term subsequent to the term at which the judgment was rendered, it was in its nature a new action brought for a specific purpose, and a rehearing was granted because it was considered as equitable in its nature; the judgment which it sought to vacate being in an equitable action. In the opinion by Mr. Commissioner Hastings, upon the rehearing, it was said that this rehearing was "allowed presumably on the authority of *Morse & Co. v. Engle*, 26 Neb. 247." In that case the rule was said to be that "an action in equity, or any special proceeding therein in the nature of a final order, may be reviewed on appeal." But, as we have already pointed out, in *Morse & Co. v. Engle,* the proceeding to vacate the decree in the district court was instituted at a term subsequent to the term at which the decree was entered, and the motion to dismiss the appeal was overruled, holding that such an order was appealable before the second trial of the case was had in the district court. This decision upholding the appeal in *Morse & Co. v. Engle* was approved and relied upon in the opinion of Mr. Commissioner Hastings in *Browne v. Croft,* and yet the appeal in *Browne v. Croft* was dismissed. This, of course, could be right only in case the petition to vacate the judgment of the district court was regarded as a motion or application made at the term in which the original judgment was entered. It appears that the only question considered by Mr. Commissioner Hastings was whether,

upon application made at the term at which the judgment was entered, an order which merely vacated the judgment and allows the defendant to answer is a final order. The question whether a proceeding begun at a subsequent term by petition and heard upon evidence as in an independent action is appealable was not considered.

In *Continental Trust Co. v. Peterson*, 76 Neb. 411, 417, the proceedings of the district court were quite complicated. It is said in the opinion upon rehearing that the order appealed from, "not only revived the judgment, but also assumed to set aside and nullify a judgment of the district court in another and independent case." Such an order, of course, would be without jurisdiction and of no effect. Perhaps it was largely for that reason that the appeal was finally dismissed.

In *Trimble & Blackman v. Corey & Son*, 78 Neb. 639, judgment was entered in the district court at a special term called for the hearing of specially assigned cases. At the next regular term the case was heard upon a petition of the defendants for a new trial. The district court vacated the judgment, and from that order an appeal was taken to this court. The order appears to have been vacated by this court because it was not supported by any evidence. The question whether an appeal would lie in such case does not appear to have been considered in this opinion. Afterwards, upon second appeal (86 Neb. 5), it was held that the order was not appealable. This was not in harmony with the former decisions of this court, and it is overruled.

So far as there are expressions in other opinions of such a general nature as would indicate that a judgment of the district court vacating a former judgment upon petition filed at a subsequent term, and trial thereon, as prescribed in the statute, is not appealable, those cases are disapproved. In the case at bar the petition to vacate the former judgment was filed at a subsequent term, a trial was had thereon, and a decree entered vacating the former judgment. Such decree is appealable.

A petition to vacate a judgment on the ground of fraud and perjury should allege that there is a meritorious defense of the suit in which the judgment is obtained. The plaintiff contends that, if only a partial defense is alleged, there must be an offer to pay the amount justly due. This rule obtains where it appears that there is a definite sum justly due, notwithstanding the alleged defense, but the rule cannot be applied in actions for damages of this nature. In *Kime v. Fenner,* 54 Neb. 476, this court said: "If the answer presented any defense, partial or complete, on which Kime could rely on a trial in the district court, it was sufficient."

The plaintiff cites *Wabash R. Co. v. Mirrielees,* 182 Mo. 126, 145, in which that court said: "But, as already said, the bill does not show any meritorious defense to the cause of action. It proceeds solely upon the ground that the alleged fraud and perjury was for the purpose of *increasing* plaintiff's damages. This court cannot assume that there was not sufficient evidence outside of said alleged perjury to sustain the verdict." That action was decided upon the pleadings therein. The evidence was not before the court, and, moreover, it was held in that case that "fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. It cannot be set aside on the ground that witnesses falsely testified as to issues settled by the judgment, unless the party obtaining the judgment by some trick or artifice or fraudulent conduct in some manner deceived the other as to what the witnesses would testify to." This court, as said in *Barr v. Post,* 59 Neb. 361, is committed to the doctrine that "the intentional production, by a litigant, of false testimony to establish a cause of action or defense amounts to such a fraud as will, in a proper case, entitle the adverse party, if unsuccessful, to the vacation of the judgment rendered against him."

It is also urged that the evidence is not sufficient to support the decree vacating the former judgment. The defendant answers this objection in the brief with the suggestion that, as no motion for new trial was filed in district

court, the question of the sufficiency of the evidence cannot be raised here. Without regard to this suggestion, we prefer to examine the evidence, which is not extensive, and which was examined and passed upon by the trial court. It appears that in his petition in the original action the plaintiff alleged various injuries to his person, and, among others, that his face was "bruised, cut and torn over his left eye, and his scalp torn." He alleged that these injuries were permanent. The case was tried twice in the district court, and upon the first trial the plaintiff was asked some question in regard to the effect of his injury upon the eye, and answered: "Why, I lost the sight of my left eye." The plaintiff then took leave to amend his petition, but afterwards, when the case came on for further hearing, the plaintiff having failed to amend his petition in that regard, he was asked: "How did that cut on your eye affect your eye?" He was not allowed to answer this question, but he produced his physician, Dr. Impey, as a witness who testified to the cut over his left eye, and that it had healed up, and that there was a scar left which had not completely healed. He was asked, "And no permanent effect from that, at all?" and answered: "The eye, I think, is permanently injured." The evidence was that some time prior to the injury complained of the plaintiff had suffered an injury from being thrown out of a buggy, and that in his claim for insurance Dr. Impey had testified that the plaintiff had lost the sight of his left eye by this former injury, and the plaintiff had recovered his insurance upon that basis. Upon the hearing in this case, Dr. Impey testified that he was the plaintiff's attending physician upon his former injury. Being asked what kind of an injury it was he treated him for, he answered: "I don't remember the exact nature of these injuries. I think he was hurt about the face and head, if I remember right." And when he was asked the nature of the injury he testified: "I don't remember the exact injury. He was thrown out or thrown over the dashboard, and I think he was kicked about the head and face at the time. * * * He was kicked by the horse, but I could not say where, ex-

actly. Q. Do you remember the result of that kick? A. I think he fully recovered. Q. Do you remember the result of it? Did you have to sew up the wounds, or what did you have to do with the wound that resulted from the kick? A. I don't remember what I did for him at that time? Q. How long was he in bed after that? A. I don't know that, either. Q. How long did you attend him? A. Could not say." When he was asked, "You have stated, have you, all you can remember about the injury that occurred at that time?" he answered: "Yes, sir, I have." After Dr. Impey had testified, the plaintiff was recalled, and was asked, "What was the nature of that injury?" and answered: "The eye was swollen quite bad. * * * Q. How long were you laid up from the effects of that injury? A. About two weeks, and I went to work again. Q. Did you ever experience any later effects from it after the two weeks? A. No; nobody else except Doctor Impey. Q. What I am asking you is, whether you recovered entirely from that, at the end of the two weeks? A. Yes, sir; I was a little weak for a while, but it gradually got better. Q. State whether or not, at the time you fell down this elevator shaft, and for years prior to that time, you had suffered from this injury, this prior injury, at all? A. Yes, sir. Q. What I want to know is whether you were suffering from this injury, after you got hurt, thrown out of the buggy? A. No, sir; no trouble and no pain at all. * * * Q. You have never called any specialist? A. No, sir. Q. What else did Dr. Impey do besides putting a poultice on the eye? A. Nothing. Q. Was the eye swollen up so you could not see? A. Yes, sir; a few days. Q. How many days do you think it was swollen up so you could not see? A. I don't quite remember; I think it was three or four days. Q. But still you were confined to the house something like two weeks from this? A. Yes, sir. Q. Were you hurt any place else? A. No, sir."

The trial court saw these witnesses and observed their manner and the effect of their testimony, and evidently concluded that they intended to and did deceive the court

and jury, probably leading them to believe that the plaintiff had lost the sight of his eye by reason of the accident for which he sued. The law necessarily trusts largely to the discretion of the trial court in such matters. This court cannot interfere, unless there is an abuse of discretion. Under such circumstances, the decision of the trial court in passing upon the application to vacate the former judgment ought not to be interfered with by this court.

It follows that the judgment of the district court is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

PACKERS NATIONAL BANK, APPELLANT, V. GEORGE F. RUSHART, APPELLEE.

FILED MAY 14, 1915. No. 18093.

Banks and Banking: COLLUSIVE LOAN BY CASHIER: LIABILITY. Where the maker of a promissory note and a bank cashier are engaged in a joint enterprise, in which each has a contingent beneficial interest, and the cashier, without the knowledge of any other officer of the bank, loans money of the bank to be used in furtherance of the enterprise, taking the note of his associate, payable to the bank, for the amount loaned, the maker of the note will be held liable therefor, notwithstanding the promise of the cashier to hold him harmless.

APPEAL from the district court for Sarpy county: HARVEY D. TRAVIS, JUDGE. *Reversed with directions.*

D. L. Johnson, for appellant.

Smyth, Smith & Schall, I. J. Dunn and *J. J. O'Connor, contra.*

MORRISSEY, C. J.

This is an appeal by the Packers National Bank of South Omaha from a judgment of the district court for Sarpy county in favor of the defendant, in an action on a promissory note. The note is made payable to plaintiff, is dated

November 22, 1909, and signed by the Mohawk Mining Company, George F. Rushart, and C. P. Moriarity, and is for $12,625 and interest. This note was given in renewal of a former note signed by the same parties for $11,500. The Mohawk Mining Company was a copartnership, and prior to the commencement of this action had been adjudicated a bankrupt in Oklahoma. C. P. Moriarity, the other maker, had also been discharged in bankruptcy prior to the commencement of this action.

There was service of summons on the defendant Rushart only. He admitted the execution of the note, but alleged want of consideration, claiming that he is a mere accommodation maker. He alleged that Frank J. Moriarity, who had been cashier of plaintiff bank for a long term of years, but who died before the making of the note in suit, had become interested in a coal mining property in Oklahoma, and that he was desirous of borrowing the money of the plaintiff bank without the knowledge of the other officers of the bank; that, beginning in 1907, from time to time, the cashier honored the drafts of the parties operating the mine, and this defendant gave his notes to the bank to cover the amounts thus advanced; that he had induced defendant to sign these notes on the express promise that he would not be held liable upon any note which he might sign; that the drafts were paid and the money advanced prior to the making of the note given to cover the amount of any draft; that at the time of the cashier's death these notes had all been merged into the one note of $11,500; that this note, like the notes preceding it, was made at the request of the cashier, and with the agreement that he would hold defendant harmless; that there was no consideration therefor, and that it was made for the accommodation of the plaintiff; that the plaintiff was in possession of all the facts at the time the note was signed, and the plaintiff advanced no sum whatever on account of said note or as a consideration therefor. By reply these matters were put in issue, and it is alleged that the money was loaned to defendant and C. P. Moriarity and the Mohawk Mining Company, a copartnership composed of defendant

and C. P. Moriarity. The case was submitted to the jury, and, from a verdict and judgment in favor of defendant, plaintiff brings the cause here for review.

It is insisted that the court ought to have directed a verdict in favor of plaintiff, and this makes it necessary to consider, somewhat at length, the evidence in the case.

The record discloses that, prior to the loaning of any money by plaintiff, one E. B. Rushart (also spelled Ruysschaert), a brother of defendant, and one Bonnert were operating a coal mine in Oklahoma, and this defendant was living at Fort Crook, Nebraska, and intimately acquainted with plaintiff's cashier. Through the efforts of defendant the cashier became interested in the mine, and he caused an investigation of the property to be made, with the result that, December 22, 1906, Rushart and Bonnert made a bill of sale conveying the mining property to defendant and Charles P. Moriarity, a brother of the cashier. January 2, 1907, defendant and his brother, E. B. Rushart, and plaintiff's cashier and his brother entered into a written agreement, whereby it was provided that when all indebtedness of every character whatsoever, existing against the old firm of Rushart & Bonnert, and when all indebtedness of every character whatsoever against the new firm, composed of George F. Rushart and Charles P. Moriarity, should be paid, and when all indebtedness existing by virtue of their operation of the mine, and the balance due to Fred Bonnert on account of his contract with plaintiff's cashier should be paid, all of the rights and privileges formerly held by the firm of Rushart & Bonnert, "and now temporarily held by Charles P. Moriarity and George F. Rushart, and all of the machinery and other personal property and assets of every description now being used in the mining of coal on the north half of northwest quarter, section 22, township 20 north, range 13 east, in Indian Territory, shall be held by Frank J. Moriarity of Omaha, Nebraska, and George F. Rushart of Omaha, Nebraska, and Edward B. Rushart (spelled Ruysschaert) of Tulsa, Indian Territory, owners in common, each of said parties owning an equal undivided one-third of all of the

aforementioned property. Provided, however, until the foregoing conditions arise, that is, until the time when all of the obligations of all the foregoing named firms shall have been satisfied in full, Edward B. Ruysschaert of Tulsa, Indian Territory, shall have equal right and authority, in the operation of the coal mining claim, * * * with Charles P. Moriarity, who is, at present, managing the coal mining operations. * * * In witness whereof, we have hereunto signed our names this 2d day of January, 1907. Edward B. Ruysschaert. George F. Rushart. F. J. Moriarity.

"The above facts and conditions admitted and accepted by me. Charles P. Moriarity."

It is undisputed that the only money that was ever put into this enterprise by the defendant or either of the Moriaritys belonged to the plaintiff bank, being advanced from time to time as needed, and that the whole sum was finally merged in the note in suit. Part of the time the notes were signed by George F. Rushart alone, and part of the time by George F. Rushart, C. P. Moriarity, and the Mohawk Mining Company, the firm name under which they operated. It is also undisputed that the cashier, one of the parties to this enterprise, was the only officer of the plaintiff bank in any way interested in the enterprise, and that no other officer of the plaintiff had any knowledge whatsoever of the transactions. Defendant evidently had good credit at the bank, for he testifies: "A. Well, Mr. Moriarity let the Mohawk Mining Company have the money. He wanted me to sign those notes so his people there in the bank wouldn't catch on to it." He says that he signed the notes at the request of the cashier; that he received no money at the time of signing; but it is conceded that the money went into this mining venture. "Mr. Moriarity told me there was drafts from Oklahoma on him direct; that is, my brother and his brother—he said he paid a couple of those drafts, and he wrote a letter to him not to draw that way any more—that he better draw on me; that the people in the bank had full confidence in me and would not question anything I done; that if the money was loaned through

him it might look bad for him, and he didn't want them to catch on. * * * He told me he wrote them (referring to the parties operating the mine) a letter that they had better draw on me for it. He said, 'I will have to use your name on this, George—not to let them people know anything about this. This will be paid in a little while, and I will have to use your name. I will take care of you.' And I told him 'All right.' * * * Why, he would take care of it, he said. My name would never be known. He said he would take care of the notes himself. The mine was to pay him back. Q. You knew when you signed the first note that Mr. Frank Moriarity was interested in the mining company, did you? A. I knew he owned it until it was paid for." The date of the first note is not given, but it is quite apparent that it was after the written agreement made January 2, 1907, under which defendant took an interest in the property. Defendant has never disclaimed the interest given him under the contract signed January 2, 1907, but affirmed it on the witness stand. On his cross-examination the following testimony was elicited: "Q. You knew at the time the contract was signed above the bank, did you, that Mr. Moriarity, Mr. Frank Moriarity, was to have an interest in the business after the debts were paid? A. Yes, sir; he was to furnish the money, all the money, and then he was to have interest. Q. What interest was he to have? A. One-third. Q. Who was to have the other two-thirds? A. My brother, myself, and when all the debts were paid Mr. Moriarity got his money back. Q. That is, after all the money the bank had loaned had been paid? A. Yes, sir. Q. Then the interest in the business was to be divided into three parts, of which Mr. Frank Moriarity was to have one, his brother one and you one; is that correct? A. Yes, sir; but this $5,000 to Mr. Bonnert was to be paid that Mr. Moriarity stood good for. Q. That is, after all the debts, either for the purchase of the plant and payment of the running expenses, were paid, then you three were to divide it up, were you? A. Yes, sir; one-third each."

This, we think, makes it clear that these parties were engaged in a joint venture. The defendant was a party in interest. He signed the notes in order to procure the money to engage in the business and to operate it, and the cashier, by virtue of his position in the bank, was able to loan plaintiff's money on the faith and credit of defendant's note. They believed at this time that the business would be profitable, and that out of the dividends they would be able to pay back to plaintiff bank all of the money borrowed, and ultimately they would possess this property free and clear of all incumbrances, and this they agreed should be equally divided, one-third to defendant, one-third to the cashier, and one-third to the brother. It is entirely probable that they never dreamed of a possible failure, and that when this money was borrowed all parties honestly intended to see it paid. But this defendant knew, as his testimony shows, that the money was advanced on the faith and credit of his note; he was informed by the cashier that the other officers would not know of the undertaking, that it was necessary to have this note in order to secure the money for this enterprise, and had the undertaking proved successful and the dividends been sufficient to meet the indebtedness, as was contemplated in their agreement between themselves, he would have received an undivided one-third interest in this business, which at the time probably appeared to all of the parties very valuable. But this, like many another mining venture, failed; the cashier died; the other maker of the note was declared a bankrupt, and the defendant's dream of easy money ended in a lawsuit.

"A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction." *Buffalo County Nat. Bank v. Sharpe,* 40 Neb. 123.

There is no disputed question of fact to submit to a jury.

In *Mendel v. Boyd*, 71 Neb. 657, this court said: "It is well settled that the general authority of the cashier of a bank does not authorize him to issue drafts of the bank for himself, or for his private business. *Lee v. Smith*, 84 Mo. 304, 54 Am. Rep. 101; *Anderson v. Kissam*, 35 Fed. 699; *Lamson v. Beard*, 36 C. C. A. 56, 45 L. R. A. 822; *West St. Louis Savings Bank v. Shawnee County Bank*, 5 Otto (U. S.) 557. This rule is founded on the familiar rule of the law of agency, which forbids that an agent shall act for himself and for his principal in one and the same transaction. It is founded on sound considerations of public policy, and the recognized inability of any person to faithfully serve two masters at the same time. Consequently, when the cashier issued these drafts, he did so without authority, and his conduct is to be viewed in no more favorable light than that of any other person who, without authority, appropriates the property of another to his own use."

Defendant knew at the time the money was borrowed that the cashier was making the loan without the knowledge or authority of any other officer of the bank. He knew that it was going into this private enterprise in which defendant and the cashier were interested, and plaintiff is not bound by the promises of the cashier to hold defendant harmless.

It being proved beyond question that the money loaned by the bank was received by the Mohawk Mining Company, of which this defendant was a copartner, and that this defendant knew at the time of making the various notes, and at the time the money was advanced, that the cashier of the plaintiff was engaged in a private enterprise which he was concealing from his principal, and this defendant having a contingent beneficial interest in the enterprise, he will not be permitted to offer the statements or promises of the cashier to defeat payment of the note. The court should have instructed a verdict for the plaintiff. The judgment of the district court is reversed, with directions to enter judgment for the plaintiff.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

EDWARD MILLER, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MAY 14, 1915. No. 18072.

1. **Master and Servant: DEATH OF SERVANT: NEGLIGENCE: PROOF.** In an action to recover for the death of a servant, alleged to have been caused by the negligence of the master, the plaintiff is required to prove at least one or more of the alleged negligent acts set forth in his petition.
2. **Evidence examined, its substance stated in the opinion, and *held* to be insufficient to sustain a judgment for the plaintiff.**

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Byron Clark, Jesse L. Root and *E. C. Strode,* for appellant.

Mahoney & Kennedy, contra.

BARNES, J.

Action by the administrator of the estate of Frank J. Miller against the Chicago, Burlington & Quincy Railroad Company to recover for the pecuniary loss sustained by decedent's next of kin by reason of his death. It was alleged in plaintiff's petition that the defendant was guilty of negligence in allowing a heavy metal lamp to fall from the cab of the engine on which decedent was working as a fireman; that the lamp struck him on the head and knocked him off the engine, thereby causing his injuries and death. This ground of negligence was abandoned, and the negligence on which the cause was submitted to the jury was stated in plaintiff's petition, in substance, as follows: That Frank J. Miller was employed by the defendant as a locomotive fireman, and was discharging his duties on an engine operated by defendant in handling interstate commerce between Sioux City, Iowa, and Laketon, Nebraska; that prior to the 10th day of February, 1912, defendant had carelessly and negligently permitted its track and

roadbed, including the Y's and switches thereof, to be and become uneven, loose and unsafe, particularly in and about Laketon, Nebraska; that on that day, while plaintiff's decedent was engaged in the discharge of his usual duties as locomotive fireman on engine number 1236, and while exercising all due care and caution on his part, and wholly without negligence of any character whatsoever on his part, the defendant ran said engine at a high and dangerous rate of speed over its tracks, including the south Y switch at Laketon, Nebraska, which tracks, switches and Y's had been carelessly and negligently permitted to become uneven and unsound, loose and unsafe, thereby negligently rocking and jolting said engine so that said Miller was caused to fall from said engine, and by reason thereof was killed. The defendant by its answer denied the allegations of negligence contained in the petition, and alleged: "The injury to and the death of said Frank J. Miller were due wholly to and caused solely by his own carelessness and negligence, and without any carelessness and negligence on the part of the defendant." The reply was a general denial. Trial in the district court for Douglas county resulted in a verdict for the plaintiff, and the defendant has appealed.

Appellant contends, among other assignments of error, that the verdict and judgment are not sustained by the evidence, and this contention is the only one which will be considered. It appears that Frank J. Miller, while employed as a fireman on locomotive number 1236 belonging to the defendant railroad, which locomotive was pulling a train of empty ice cars going north to Sioux City, Iowa, fell from his engine near Laketon, Nebraska, and was killed. The head brakeman on the train was a witness for plaintiff, and described the accident, in substance, as follows: The last time I saw Miller before the accident he was standing in the gangway of the engine cab, which is the place where the fireman stands and does his work. This was about three or four minutes before he received his injury. I heard something crack, and I looked around and saw Miller fall out of the gangway. When I saw him he

was going out of the gangway between the engine and the cab. He seemed to be whirling. His left side was to the west and turned to the right. He just kind of slid out level. He tipped out and dropped level to the ground. His hands were not raised above his head. He struck the ground about the back end of the tank and about three or four feet from the rail. His head was south and his feet to the north, parallel to the track. He struck right on his face. The rails at that point were 75-pound rails. The roadbed was cinder or cinder ballast. The speed of the train was about 20 miles an hour. The train was stopped, and I went back and picked Miller up. He was unconscious, and was bleeding from the left side of his head.

One J. J. Sullivan, an old Union Pacific engineer, was called as a witness for the plaintiff, and, after qualifying himself as an expert engineer, testified that during his experience as an engineer in the early seventies or eighties, he had driven locomotives over rails of the weight of about 75 pounds; that such rails were considered light in comparison with the rails of to-day; that unless conditions were very good it would be serious to operate locomotives at a high rate of speed over switches when they were placed on a cinder roadbed; that in such case there would ordinarily be a sudden lurch; that the lurch would be at the highest speed and it would be on the side of a low joint; that cinder tracks are more or less spongy, and that a schedule on that sort of a road ought not to be over 15 miles an hour. On cross-examination the witness refused to say at what stations it would be dangerous, but said that in certain places it might be dangerous to run 20 miles an hour, because there is a certain moisture in the roadbed. The plaintiff's witness who saw the deceased fall out of the cab does not testify that there was at that time any lurch of the engine that caused him to fall, and there is no witness who so testified, and there is consequently no direct evidence that the lurching of the engine caused the deceased to fall. The plaintiff's contention is that if they show that there might be a lurching of the engine, and that there would naturally be some lurching,

and that this was caused by the negligence of the defendant, then the burden would be upon the defendant to show that the accident was caused in some other way. This would be true if the nature of the circumstances was such as to preclude any more accurate evidence, but if this engine was lurching excessively, and particularly if a sudden lurch of the engine at that time caused the deceased to fall, that fact might easily be proved by the witness who testified for plaintiff in the case, and the fact that he did not so testify would seem to negative the contention of the plaintiff that the accident was caused by a sudden lurch of the engine.

The foregoing is the substance of plaintiff's evidence. The defendant requested the court to direct a verdict in its favor. The motion was overruled. No evidence was introduced by the defendant, and the jury returned a verdict for plaintiff for $5,000, on which the court rendered judgment. There is no evidence in the record of the condition of the defendant's roadbed. There was no testimony introduced in any manner relating to the weight, condition or equipment of the defendant's engine. There was no evidence introduced showing or tending to show any defect in the defendant's track or switches, or that there was a low joint at the place where the accident occurred. As we view the record, the verdict of the jury must have been based on mere conjecture. It seems clear that the plaintiff failed to produce sufficient evidence to show actionable negligence. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

EMELIA WISENSTINE, APPELLEE, V. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, APPELLANT.

FILED MAY 14, 1915. No. 18131.

1. **Insurance: APPLICATION: FALSE STATEMENTS.** Where the agent had inserted in the application for life insurance a representation of the age of the insured, which was untrue, but which the agent himself knew to be untrue, and at the same time stated to the insured that it was immaterial, and so procured the assent of the assured, this was the act of the company, and not of the assured, and would not invalidate the policy.
2. ———: ———: ———: **ESTOPPEL.** In such case the statement signed by the applicant, but which is prepared by the agent with full knowledge of the facts, is not the false statement of the insured, but is the representation of the agent of the company, and the company will be estopped to declare the policy void for such misstatement.
3. ———: **SETTLEMENT: SETTING ASIDE: FRAUD.** Where in such case an agent of the company, in order to effect a settlement with the beneficiary, makes a statement to her that the policy is void on account of a misstatement as to the age of the insured, that the courts have all so decided, that he is right, and that the company will not stand for it, and the beneficiary, having no opportunity to make a proper inquiry, relies on his statements, a settlement of her claim of $5,000 for $425 will be set aside, upon her return of the check given her to procure such settlement.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Dunshee & Haines and *John D. Ware,* for appellant.

Sullivan & Rait and *George B. Thummel, contra.*

BARNES, J.

This was an action at law upon a written certificate of membership in the defendant association issued to plaintiff's decedent, Frank B. Wisenstine, in which the plaintiff was named as his beneficiary. The plaintiff prayed for a judgment of $5,000, the amount specified in the certificate, and alleged, and the defendant admitted, that the

assured came to his death by accidental means. The defendant by its answer denied that the policy was in force at the time of the death of Frank B. Wisenstine, and denied that it was indebted to the plaintiff. The answer further alleged, in substance, that defendant was a mutual assessment association, organized under the laws of the state of Iowa, and was licensed to transact business in Nebraska. Its articles of incorporation and its by-laws were set out in the answer, and it was particularly alleged that the association could only insure persons within the ages of 21 and 55 years; that Frank B. Wisenstine, at the time he made his application for membership, was only a few days past 18 years of age, and that he fraudulently represented that he was of the age of 21 years, and signed an application to that effect; that therefore the certificate was obtained by fraud, and was nonenforceable and void. It was further alleged that, when the association ascertained the facts, it denied its liability, and thereupon a settlement and compromise was effected with the plaintiff by which the company delivered to her a check for the sum of $425, in full satisfaction of her claim. The plaintiff by her reply alleged, in substance, that the settlement was obtained by fraud and misrepresentation, and that as soon as she learned the facts she repudiated the alleged settlement and returned to the defendant the check which she had received. The cause was tried to a jury in the district court for Douglas county. Plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that two questions were submitted to the jury: First. Was the policy obtained by false representations on the part of Frank B. Wisenstine in regard to his age? Second. Is the release which plaintiff signed on July 8, 1912, binding upon her? It is appellant's contention that the court erred in submitting those questions to the jury, and that the court should have directed a verdict in defendant's favor. The evidence discloses that a Mr. Haas, an agent for the defendant company, was stopping at the hotel in Battle Creek, Nebraska, which was owned by Frank B. Wisenstine's father; that the agent was stren-

uously urging Frank to procure a policy in his company; that the assured made the usual objections to becoming a member, insisting, among other things, that he had no money to pay for the policy; that in the course of the conversation Frank's father offered to loan him the money for that purpose, and the agent thereupon wrote out the application; that nothing was said about the age of the assured at first. It appears, however, that before the application was written the agent informed Frank that, in order to become a member, he must be 21 years of age. There is no evidence in the record, however, which shows or tends to show that Frank ever saw any of the defendant's literature, or ever had any notice of the alleged age requirement, other than that stated by Mr. Haas. It further appears that Haas said to Frank that he was so near 21 years old that he would write his age in the application as 21 years, and that upon that statement Frank signed the application. It thus appears that the agent knew that Frank was not 21 years old when he signed the application. Having this knowledge, Haas sent in the application to his company without any statement discrediting it, and collected the premium, and the policy was at once issued.

As we view this question, the assured was not guilty of fraud in signing the application on which the policy was issued; that, as a matter of fact, the only fraud practiced was that of the agent in concealing from his company the age of the assured. In *Union Mutual Ins. Co. v. Wilkinson,* 80 U. S. 222, it was said that, where agents soliciting insurance undertake to prepare the application of the insured, or to make any representations to the insured of the character or effect of the statements of the application, they will be regarded as agents of the insurance companies, and not of the insured. In that case the agent had inserted in the application a representation of the age of the mother of the insured at the time of her death, which was untrue, and it was held not to invalidate the policy. The same rule is announced in *Hingston v. Ætna Ins. Co.,* 42 Ia. 46; *State Ins. Co. v. Jordan,* 29 Neb. 514. The agent of the defendant testified that, knowing that Frank was

ineligible to membership, he put his age in the application as 21. It is well settled that, where the agent is aware of conditions which, if concealed by the insured, would avoid the policy, but the agent, either by fraud or mistake, inserts incorrect or untrue answers, the company is responsible for the agent's conduct, and cannot repudiate the contract on that ground. *Eggleston v. Council Bluffs Ins. Co.*, 65 Ia. 308; *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304; *Taylor v. Anchor Mutual Fire Ins. Co.*, 116 Ia. 625; *Fidelity Mutual Fire Ins. Co. v. Lowe*, 4 Neb. (Unof.) 159. In *Jamison v. State Ins. Co.*, 85 Ia. 229, 234, it was said: "He (the agent) knew all material facts when he prepared the application, and, having undertaken to prepare it, his duty required him to state them correctly. Mrs. Jamison gave the required consideration for the insurance, and relied upon the agent, as she had a right to do, to discharge his duty in a proper manner. His failure in that respect was the fault of the defendant, and it will not now be permitted to escape liability by taking advantage of its own wrong." The same rule is announced in *Eckert v. Century Fire Ins. Co.*, 147 Ia. 507; *Roe v. National Life Ins. Ass'n*, 137 Ia. 696; *Pringle v. Modern Woodmen of America*, 76 Neb. 384. We are aware that the authorities on this question are somewhat conflicting, but we feel constrained to follow the recent and more equitable doctrine announced in the foregoing decisions.

It is further contended by the appellant that the court erred in submitting to the jury the question of fraud in the settlement, on which plaintiff relied to enable her to maintain her action, because there was no evidence which would support a verdict in her favor on that question. The plaintiff testified that Mr. Edson, the defendant's agent, when he called on her to adjust the matter, said to her: "I looked this application over in my room last night and I find that Frank misrepresented his age, and this makes the policy perfectly worthless." There was nothing on the face of the application which gave Edson any such information. The application did not show that Frank had made a false statement, and the agent must

have had independent knowledge of Frank's real age. If he had no such knowledge, he could not say that Frank had been guilty of fraud and that the policy was void. In addition to this, Edson stated to the plaintiff that she could consult any lawyer if she wanted to find out if he was right; that she could take his word for it, that he was right, and that his company would not stand for it. It appears that there was no lawyer in Battle Creek whom Mrs. Wisenstine could consult. She stated that the agent seemed fair, and that she finally took his word for it. It appears that Edson's statement that the company was not liable on the policy and that all the courts had so decided was not true. He must have known that this was not true, because very many of the courts have decided otherwise. The rule in such cases is that, when a person, falsely assuming knowledge of certain facts, makes representations thereto without knowledge of the truth or falsity thereof, he is subject to the same liability for injuries resulting therefrom as if they were made with full knowledge of the facts. Mrs. Wisenstine could not have found out for herself that what Edson had told her was untrue, and therefore she had a right to rely on his statements. *Perry v. Rogers*, 62 Neb. 898; *Foley v. Holtry*, 43 Neb. 133; *Martin v. Hutton*, 90 Neb. 34. As we view the record, the court did not err in submitting the question to the jury.

After a careful examination of the record, we are convinced that it contains no reversible error, and the judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

PHEBE J. PETERSON ET AL., APPELLEES, V. GEORGE E. DAMOUDE ET AL., APPELLANTS.

FILED MAY 14, 1915. No. 18088.

Partition: DEVISE: RESTRICTION ON PARTITION: VALIDITY. Involuntary partition of an estate devised in equal shares to the testator's children cannot be decreed contrary to a provision in the will which forbids division for a reasonable time fixed by testator in definite terms; the condition not being a void restraint on alienation nor a limitation repugnant to the fee.

APPEAL from the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Reversed and dismissed.*

Hainer, Craft & Aylsworth and *Frank E. Edgerton,* for appellants.

B. F. Good and *J. H. Grosvenor, contra.*

ROSE, J.

This is an action for partition. From a decree granting the relief prayed by plaintiffs, defendants have appealed.

Joseph Damoude died in Hamilton county, December 24, 1905, leaving a wife and 13 children. His widow died December 6, 1910. He left a will containing these words:

"I give devise and bequeath to my beloved wife, Wilhelmina Damoude, all of my real estate, to have and to hold for the term of her natural life, and to have all the rents and profits arising therefrom, and at her death said lands shall descend in absolute title and in equal shares among my children living, or their legal representatives. Providing, however, that said real estate shall not be disposed or divided among my said children prior to the 5th day of October 1921."

The real estate thus devised consists of a 480-acre tract in Hamilton county. Nine of the testator's children instituted this action against the others March 16, 1912. Partition was decreed on the ground that the proviso is repugnant to the devise. To uphold the trial court plain-

tiffs argue that the limitation violates the doctrine that a restraint on alienation cannot be attached to the fee, and cite *Loosing v. Loosing,* 85 Neb. 66, and similar cases. Did testator devise the fee in equal shares to his 13 children, and, by means of a subsequent provision, attempt to prevent each from selling or assigning the undivided one-thirteenth interest before October 5, 1921? The intention to prevent partition until that date, or until after the youngest child attains the age of 21 years, is clear: "Said real estate," reads the will, "shall not be disposed or divided among my said children prior to the 5th day of October, 1921." The word "divide," in the connection in which it is thus used, evinces a testamentary purpose to delay partition temporarily, or to postpone a division of the entire estate among the devisees. *Hill v. Hill,* 261 Mo. 55. The property which shall not be "disposed or divided" prior to the date fixed by testator is "said real estate." The reference is to all of the land devised to the 13 children. It is clear, therefore, from the terms of the entire will that the restriction in the proviso applies alone to the 480-acre tract. It follows that each devisee is left free to sell his individual estate at any time, and that cases cited to support the argument that a testator who devises the fee cannot impose restraints on alienation are not in point. The decisive question presented by the appeal may be stated thus: Is the provision temporarily suspending partition a reasonable and valid exercise of testamentary power? Authority is nearly unanimous in answering the question in the affirmative. *Hill v. Jones,* 65 Ala. 214; *Dee v. Dee,* 212 Ill. 338; *Heininger v. Meissmer,* 261 Ill. 105; *Hunt v. Wright,* 47 N. H. 396; *Roberts v. Wallace,* 100 Minn. 359; *Buschmann v. McDermott,* 139 N. Y. Supp. 314; *McInteer v. Gillespie,* 31 Okla. 644; *Greeney v. Greeney,* 155 Wis. 621.

In Gray, Restraints on Alienation of Property (2d ed.) sec. 30, it is said: "Whatever the true doctrine may be, a prohibition against partition is not a restraint on alienation, as the undivided share is always assignable."

In *Dee v. Dee,* 212 Ill. 338, 354, the report shows that the testator left a life estate to his widow, Hanorah Dee, and the remainder to his children. In discussing in that case the question here under consideration, the supreme court of Illinois said: "Is appellant entitled to partition prior to the death of Hanorah Dee? It is evident from the language of the will that it was the purpose of the testator to postpone a division of the estate until her death. The general rule is that an adult tenant in common may demand partition as a matter of right (*Martin v. Martin,* 170 Ill. 639); and the fact that he is a remainderman and that the particular estate has not expired is not a valid objection (*Drake v. Merkle,* 153 Ill. 318); but equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed upon the estate by one through whom he claims (21 Am. & Eng. Ency. Law (2d ed.) 1158; *Hill v. Reno,* 112 Ill. 154; *Ingraham v. Mariner,* 194 Ill. 269; *Brown v. Brown,* 43 Ind. 474; *Hunt v. Wright,* 47 N. H. 396); nor is such a condition or restriction in the instrument conveying the estate invalid as repugnant to the estate granted, or as against public policy (*Hunt v. Wright, supra*). We regard the language of the will fixing the time at which the estate shall be divided as an express condition against partition prior to that time. No partition can be had, therefore, until the particular estate of Hanorah Dee is extinguished."

In the present case the provision forbidding partition prior to October 5, 1921, being valid, the action was prematurely brought.

There is also a discussion of the meaning of the word "disposed" as it appears in the proviso that "said real estate shall not be disposed or divided among my said children prior to the 5th day of October, 1921." It is insisted that testator, by means of the language quoted, intended to prevent the devisees from mutually combining and selling the entire tract, and attempted to impose an invalid restraint on alienation. A determination of this question is not necessary to a decision. The provision re-

lating to partition is valid. Some of the children are resisting the action. The devisees have not agreed to sell the tract. In decreeing partition the trial court was in error. The judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

HAMER, J., not sitting.

NELSE SWANSON, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MAY 14, 1915. No. 18035.

Master and Servant: RELEASE: CONSIDERATION: PAROL EVIDENCE. *Tylee v. Illinois C. R. Co.*, 97 Neb. 646, re-examined, and *held* decisive of the case at bar.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Edson Rich, A. G. Ellick and *B. W. Scandrett,* for appellant.

Sullivan & Rait, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for a breach of contract by defendant for life employment of plaintiff, defendant appeals.

In August, 1905, plaintiff, while in the employ of defendant, received an injury which resulted in the loss of a leg between the knee and ankle, which he claimed was the result of defendant's negligence, but which negligence the defendant did not concede. He was taken to a hospital and there treated, as we infer from the record, at defendant's expense. While in the hospital he was visited by his foreman, Henry D. Baldwin, with whom he claims to

have made a settlement, by the terms of which he was to release the defendant from all claim on account of the injury he had received, and was to receive in return therefor $500 in cash and employment for life, or for so long a time as he desired to work, at the same pay that he was receiving at the time of his injury. He received the $500 in cash through defendant's claim agent, S. J. Peterson, and executed a release, releasing the defendant from all liability. He was also given employment by Baldwin, his previous foreman, and continued to work for the defendant at lighter employment than that in which he had been engaged prior to his injury, for a period of about five years, and until after the death of his foreman, Baldwin. Baldwin was succeeded as foreman by his son-in-law, who shortly thereafter discharged plaintiff, and this action resulted.

The brief contains 12 assignments of error, which we shall not consider in detail, but will only refer to such portions as may seem necessary to a full determination of the case. Our labor has been much lightened by our recent consideration and determination of *Tylee v. Illinois C. R. Co.*, 97 Neb. 646. A motion for rehearing was filed in that case about the time the instant case was submitted, and, the cases being so similar, we have held that motion under consideration and have reconsidered the *Tylee* case in the light of the briefs and arguments presented in this case. Our re-examination of the questions has satisfied us that the reasoning and conclusion reached in the *Tylee* case are sound and should be adhered to. We have therefore at the present sitting of court overruled the motion for rehearing in that case. The *Tylee* case, therefore, becomes authority for and is decisive of every important question arising in this case. We shall not restate the points involved and discussed in the *Tylee* case, but will refer to the published opinion therefor.

In the case now under consideration, it appears that Mr. Peterson was the regular claim agent of the defendant, and the evidence satisfies us that he had full power to make a settlement such as is alleged by plaintiff. That he did

not in person negotiate the terms of the settlement, or personally make the agreement upon which plaintiff relies, must be conceded; but the evidence shows that Peterson had on numerous occasions referred to Baldwin the settlement of claims of men working under him. Plaintiff had knowledge of this custom. When, therefore, Baldwin took up the matter of a settlement with plaintiff, plaintiff had a right to assume that he was dealing with one duly authorized to make the agreement. He was warned by Baldwin, or Peterson, or both, not to employ a lawyer, as he could do better by settling with defendant direct, or words to that effect. Plaintiff testified that Baldwin told him the matter had been submitted to the officers of the company and that he expected an answer soon; that he finally called on plaintiff and told him that he had received full authority to make settlement with him; that they were going to give him $500 in money and a life job. He also testified that at the time he signed the release in Peterson's office he told Peterson about his agreement with Baldwin for a life job, and that Peterson answered, "So much the better for you," but told plaintiff that he must sign the release before he could receive the check. Peterson first testified that at the time the release was signed he expressly told plaintiff that no one had any authority to give him a life job, but he subsequently asked to change his testimony upon that point, and his final testimony was: "There was no talk about employment and nothing about a life job."

It would serve no good purpose to set out more of the testimony. Plaintiff's testimony was sufficient, if belived by the jury, to establish the making of the settlement as alleged by him. His testimony is strongly corroborated by one circumstance: Immediately upon his being able to go to work, he was given employment by Baldwin, and remained in the employ of the defendant for about five years, during which period of time, notwithstanding the fact of his crippled condition, he was paid by the defendant the same wages he was receiving at the time of his injury, viz., $3 a day. The period of this last employment

was from early in 1906 until November 1, 1911, during all of which time his age was beyond the limit resting upon Baldwin in the hiring of men working under him, the maximum of which was 45 years. There is no theory upon which to account for the fact that plaintiff, recently crippled to the extent of losing a limb, was retained in the employment of the defendant for so many years at the same wages then being paid for younger men engaged in much more arduous work than he, except that such employment was in accordance with the contract which had been made to give him life employment as a part of the consideration for the release of his claim for damages. The law in relation to contracts of this character and in relation to ratification is clearly set forth in *Tylee v. Illinois C. R. Co., supra,* and need not be restated. We would simply add that there is stronger reason for holding that plaintiff had a right to rely upon the apparent scope of Baldwin's authority than Tylee had to rely upon the authority of the employee with whom he dealt, and the evidence as to ratification is much stronger in this case than in that.

Objection is made to the ruling of the court in the giving of certain instructions, and in refusing certain others requested by defendant. We deem it unnecessary to set them out, as we think those given are in harmony with the facts in this case as applied to the law announced in the *Tylee* case, and those refused are in conflict herewith.

It is further urged that the damages are excessive and appear to have been given under the influence of passion, and prejudice. In this contention we cannot concur. According to defendant's own illustration, as given on page 28 of its brief, the damages are not so excessive as to warrant an appellate court in interfering. It will not do to urge that no allowance was made by the jury for anything that plaintiff might be able to earn at other employment. His testimony is that he made application to other railroads, but was denied employment of any kind, on account of his crippled condition. This same condition would be urged against him by any other corporation or person to whom he might apply for employment at manual labor.

which appears to be the only employment of which he is capable. Moreover, it must be borne in mind that he is utterly incapacitated for the line of work in which he had been engaged during substantially all of the time after he had reached the age of manhood. We find no error in the rulings of the court as to the admission and exclusion of evidence, which could have prejudiced the defendant, when considered in the light of the instructions in relation thereto given by the court.

Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

UNDERFEED STOKER COMPANY OF AMERICA, APPELLANT, V. FARMERS CO-OPERATIVE CREAMERY & SUPPLY COMPANY, APPELLEE.

FILED MAY 14, 1915. No. 18082.

1. **Sales: IMPLIED WARRANTY.** "Ordinarily where a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, for a particular purpose, of which he is aware, under such circumstances that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied warranty that the article supplied shall be reasonably fit for the purpose for which it is sold." *Toledo Computing Scale Co. v. Fredericksen*, 95 Neb. 689.

2. **Appeal: AFFIRMANCE.** "Where the verdict returned is clearly right and is the only one warranted by the evidence, the judgment will be affirmed, although errors may have intervened at the trial." *United States School-Furniture Co. v. School District*, 56 Neb. 645.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Montgomery, Hall & Young, for appellant.

Stout, Rose & Wells, contra.

FAWCETT, J.

This action was instituted by plaintiff in the district court for Douglas county, to recover the contract price claimed to be due from defendant under a written contract for the complete equipment of two 150 horse-power Kinney water tube boilers in defendants plant at Omaha, with "Jones underfeed mechanical stokers" and other accessories and attachments. Plaintiff is the manufacturer of the mechanical stokers referred to, and defendant is engaged in the manufacture of butter and ice cream. The answer admits the execution of the contract alleged in the petition, but alleges, among other things, that after the stokers were installed it was found that every attempt at practical use of them resulted in the filling of defendant's factory with smoke and soot to such an extent as to actually interfere with and prevent the making of butter and the operation of defendant's factory, all of which was open, obvious and well known to plaintiff and its engineer, or engineers, employed to install and test the same; that because of the premises defendant refused to accept or operate the stokers, and requested plaintiff to remove them; that plaintiff refused so to do, and in order to continue operation of its factory defendant was obliged to, and did, at its own cost remove the stokers from the boilers and install other equipment therein. For the expense of removal of the stokers and restoring the boilers to their original condition, defendant, by way of counterclaim, prayed judgment for $1,000. The reply denied all allegations in the answer and counterclaim, and specially alleged that, if smoke or soot accompanied the use of the stokers, the same was due to the fault or negligence of defendant in, or in connection with, the operation of the boilers and stokers. There was a trial to the court and jury, and a general verdict in favor of the defendant in the sum of $473.03. A motion for a new trial was overruled, and judgment entered upon the verdict, from which plaintiff appeals.

Several defenses, in addition to the one above set out, were interposed, litigated upon the trial, and are presented by the record in this court; but, for the reason to be here-

inafter stated, none of the questions presented and argued, except the one above noted, will be considered.

Plaintiff's brief contains 25 specific assignments of error, a number of which refer to the giving and refusal of instructions. Having reached the conclusion that the verdict is the only one which could properly have been returned, we do not deem it necessary to consider these assignments; nor do we deem it necessary to consider the assignments as to the rulings of the court in the admission or exclusion of evidence, as none of such rulings, if erroneous, is of such character as to be deemed material. The principal and controlling question involved in the case is the question of implied warranty by plaintiff that the stokers would be reasonably adaptable, suitable and fit for firing the boilers in defendant's butter and ice cream factory, for which they were sold; plaintiff knowing at the time of entering into the contract that the stokers which it was to manufacture and install were to be applied to this specific use. That plaintiff knew the use which the defendant intended to make of its boilers with the stoker attachment is beyond dispute. The evidence overwhelmingly shows that, when the stokers were used for the purpose of firing the boilers, the factory would become so filled with smoke and gas that it was hard for the employees to remain in the boiler room; that it was hard to get men to stay there; that some would stay a day only, and one or two remained only two or three hours, on account of the difficulties with the smoke and gas. Mr. Eldredge, vice-president of defendant, testified: "Q. How did this smoke affect your business in the factory? A. It simply put us out of business. We could not run that factory and run those stokers; that was an absolute impossibility. Q. What are the properties of butter in reference to its susceptibility to odors and smoke and gas? A. Probably one of the most susceptible products there is. Q. What do you say about ice cream? A. Same difficulty." He further testified that the smoke was so thick that it was almost impossible to keep a force in the office. The witness Fleming, who was sent by plaintiff to make a test of the boilers and stokers, sought to avoid this testi-

mony by designating what defendant's witnesses called "smoke" as "hopper gas." Call it what you will, it is well established that it was a serious detriment to defendant's business. The evidence also shows that, as soon as the stokers were taken out and hand-firing again resorted to, there was no further trouble from this smoke or gas. Nothing would be gained by further commenting on the evidence. The jury are well supported in finding that the use of the stokers would have been destructive to defendant's business, and that they therefore were not adapted to the use to which plaintiff knew defendant intended to apply them. That defendant had a right to rely upon the implied warranty is well sustained by *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68; *Toledo Computing Scale Co. v. Fredericksen*, 95 Neb. 689; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *Kennebrew v. Southern Automatic Electric Shock Machine Co.*, 106 Ala. 377; *Fitzmaurice v. Puterbaugh*, 17 Ind. App. 318; and numerous other cases cited in defendant's brief.

The record does not disclose any prejudicial error. Paintiff appears to have had a fair trial. The judgment is fully sustained by the evidence, and is in harmony with well-settled principles of law. It is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

BESSIE LACEY, APPELLEE, V. CHAUNCEY D. ZEIGLER ET AL., APPELLANTS.

FILED MAY 14, 1915. No. 18084.

1. **Courts: JURISDICTION: POWER OF LEGISLATURE.** Section 9, art. VI of the Constitution, confers on the district courts "both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide." The equitable jurisdiction of the district courts is, therefore, beyond the power of the legislature to limit or control. While it may grant such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad

and general jurisdiction which the constitution has conferred upon them.

2. **Wills: ORAL CONTRACT: SPECIFIC PERFORMANCE.** Where a party orally contracts to devise and bequeath to another certain real estate and money in consideration that the beneficiary shall assume a peculiar and domestic relation to the promisor, and render him services of a character to make it practically impossible to estimate their value by any pecuniary standard, and the beneficiary, in reliance upon the oral promise, in good faith assumes the relation and fully performs her part of the agreement, she will be entitled, in the event of a breach of the contract by the promisor, to a specific performance of the same as made.

3. **Specific Performance: JURISDICTION: CONTRACT TO DEVISE.** And when such contract and relation are established under a single and indivisible contract, and the promisor dies without having complied with the terms of his promise, the county court is without, and the district court has, jurisdiction of an action for the specific performance of such contract.

4. ———: ———: ———. Where a court of equity can afford complete and adequate relief and by one litigation and decree adjudicate the rights of the parties, it may take jurisdiction over the entire subject matter and order a specific performance of the entire contract.

5. ———: ———: ———: **CERTIFICATION TO COUNTY COURT.** And in such case, where it appears that the estate of the decedent promisor is solvent, it may certify its finding to the county court as to the amount which it has found due from the estate and direct that the same be allowed as an established claim against such estate.

6. **Wills: CONTRACT TO DEVISE: SUFFICIENCY OF EVIDENCE.** The evidence examined, and set out in the opinion, *held* sufficient to establish an indivisible contract on the part of defendants' decedent, for a single consideration on the part of plaintiff, consisting of unusual personal services performed by her for said decedent.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

A. M. Post and *M. Whitmoyer,* for appellants.

Reeder & Lightner, contra.

FAWCETT, J.

From a decree of the district court for Platte county, awarding plaintiff specific performance of an alleged parol

agreement, by the terms of which Charles W. Zeigler agreed that he would at his death leave or give to plaintiff the sum of $5,000 in money and the home place in the city of Columbus, Nebraska, known as lots 5, 6, 7 and 8, in block 16, Gerrard's addition to that city, together with all household furniture and furnishings therein, in consideration that plaintiff would abandon any contract or claim she then had for past services, and would devote her time and attention to caring for and nursing said Zeigler, and to keeping house for him, so long as he should live, defendants appeal.

The above statement contains, substantially, the allegations in the petition as to the contract upon which plaintiff relies. She then alleges compliance on her part with the terms of the contract. Mr. Zeigler died without keeping his part of the agreement. Defendant Webster is the administrator of his estate, and the other defendants are brothers and sisters and children of a deceased sister of the decedent Zeigler. The substance of the answer of the defendant Webster, administrator, is that he admits the plaintiff performed services for the decedent and his wife within the period of three years preceding his death; that deceased left an estate of the value of about $60,000; that he is informed that his codefendants deny the rights asserted by plaintiff in her petition; that he is without knowledge as to the allegations of the petition, and therefore denies the same. The answering heirs allege, substantially, that the services rendered by plaintiff for the decedent, which formed the basis for the claim, if any, which plaintiff had, and which she alleges she abandoned at the time she made the parol agreement under which she seeks to recover, were rendered for plaintiff and one Edward A. Gerrard, a copartnership. They admit that plaintiff rendered service, under the direction of the decedent, as a nurse for his wife in her last illness and in nursing and caring for the decedent himself in his last illness; admit that they claim the entire estate of the decedent by virtue of the laws of descent of this state; admit that plaintiff is in possession of the home place above referred to, but

allege that such possession was acquired by fraud of plaintiff after the death of Mr. Zeigler, and is being maintained by force without authority of law. As to the contract relied upon by plaintiff, they allege that there is no note or memorandum in writing signed by the decedent or by any of the defendants; that the estate is solvent, and that the administrator and the several heirs are willing and anxious that plaintiff shall be amply compensated by said estate for all services rendered by her on account of the decedent or his wife, "and they hereby offer to pay and satisfy her lawful claims of every nature therefor." They then charge that by means of improper relations between plaintiff and decedent she acquired and exercised an undue influence over him, whereby she was enabled to and did dictate and control his actions in affairs of business; that early in or previous to 1909, and thereafter until his death, the decedent was afflicted with a mental disorder which greatly impaired and finally destroyed his power of mind, during which time he was under the influence and control of plaintiff, and if any promise was made by him to plaintiff, of the nature alleged by her, it was so made during the period of his aforesaid mental derangement, and was procured by means of plaintiff's undue influence and control, "and is unconscionable, illegal and void." They pray "that plaintiff's petition may be dismissed, and that they recover their costs herein expended, and for a decree quieting and confirming their title to the real property in said petition described as against the plaintiff and all parties claiming through or under her." The reply is a general denial. The court found generally for the plaintiff, quieted and confirmed her title as against the defendants to the real estate, and further ordered that defendant Webster, as administrator, pay to plaintiff from the assets of the estate the sum of $5,390, with interest from January 25, 1913, and costs; that a copy of the decree be certified by the clerk to the county court of Platte county, "wherein the said sum of $5,390, together with interest thereon from this date and costs of this suit, shall have the effect

of an established claim against the estate of said deceased."

The brief assigns eight specific errors for reversal, the second being that the judgment is unsupported by the evidence, and the seventh that the district court exceeded its power in allowing plaintiff's claim of $5,000 and interest, and assuming to distribute funds in the hands of the administrator and within the exclusive jurisdiction of the county court. A consideration of these two assignments involves sufficient of the record to dispose of the other six.

The witness Selzer testified that he had known decedent for 30 years and plaintiff since 1891; had worked on the ranch referred to during the last 21 years that it was operated; that, after the ranch was discontinued, decedent said he was going to move down to Columbus and have plaintiff keep house for him; "That he was going to give her this home property and $5,000. * * * Q. What was she to do for that? A. Maintain this house and take care of him." That plaintiff remained with and kept house for decedent until the time of his death, October 14, 1911; that decedent said he had never given plaintiff any money or paid her anything; that she had been responsible for his accumulating property; that he never had as good success as he had now. He further testified that the agreement to give plaintiff the home place and $5,000 in money was talked over by decedent in plaintiff's presence while they and the witness were "eating at the table, all three of us, after we moved down here;" that decedent told him he had traded off a house, which belonged to plaintiff, for lumber to put into his new house, and that he received $850 for it.

Mrs. Elizabeth Schmid testified that she was acquainted with the parties; that decedent sold off the stock on the ranch and moved to Columbus in 1909, after the death of his wife; that plaintiff went to Columbus and lived at the Zeigler residence thereafter; that she did the housework and cooking; took care of decedent and nursed him all through his sickness; that she (witness) frequently visited at the Zeigler home after plaintiff and Zeigler

moved there; that she was there just a week before Christmas, 1909; that at that time decedent seemed in good health; that she did not see anything wrong with him at all; that he then said that plaintiff was a good housekeeper and a good cook, and that he was going to "give her this house and property and $5,000 in cash. * * * He said the house and furniture and the lots. * * * Q. Did he say anything about what Miss Lacey (plaintiff) was to do in order to get this property? A. Why, to keep house and take care of him. Q. For how long? A. Until he died. Q. Do you know whether or not Miss Lacey did take care of him until he died? A. I do; she did. Q. Do you know, Mrs. Schmid, anything about how troublesome it was to take care of him during the last few months of his sickness? A. I do. Q. Just describe it to the court. A. I tell you I wouldn't stay there and take care of that man the way he is. * * * He was sick and he got nervous spells, and then she would have to go and put water on his head and doctor him like you would a sick person. Q. His mind wandered? A. Yes, sir. Q. Was he able to take care of himself during the last few months? A. No, sir."

Dan J. Echols testified that he knew decedent in his lifetime; knew the place where he lived in town; that in 1910 decedent told him that plaintiff had worked for him a number of years; had done her work well and was one of the best women to work he had ever known; that when he died he intended to name her in his will and give her $5,000 and the home place; that she was going to stay with him until he died.

Jacob Schmid testified that decedent talked to him about plaintiff, and said "he intended Miss Lacey to have $5,000 and the home place;" that at the time decedent told him that "we was washing him off, tending to his arms, and Miss Lacey went into the kitchen, and he told me that, and when he told me that he said she is an awful good woman;" that plaintiff remained at Zeigler's home until his death.

Mrs. Isabell Webber testified that she was well acquainted with the decedent, and was acquainted with plaintiff; that she was at the home in Columbus in April, 1910, when she heard he had been hurt in an automobile wreck, and stopped to see how he was; that decedent's health seemed pretty good, except that he had quite a serious breaking out on his arm; that on different times during the day or night she assisted in taking care of him by putting applications on his arm; that during that time decedent talked with her about plaintiff. "Q. What did he say about that—about what he had agreed to give Miss Lacey? A. Why, he said that he had agreed to give her $5,000, and after he came to town he was going to give her the home place and all of its belongings if she would stay with him until he got well, and if he got over his ailments he was going to give her $10,000 or better. He said, 'I have always agreed to give her $5,000, and I told her,' he says, 'if she will take good care of me as long as there is anything the matter with me I will give her $10,000.' Q. You say he told you he had agreed to give her $5,000 and the home place. Did he say that? A. Yes, sir. * * * Q. Did he say anything about whether or not he had paid her for her services on the ranch for taking care of him? A. He said he had never paid her anything, but had always used her money; used what she should have had to make money with; that she had also sold her house, and he had the money for that. Q. Did he mention that at this time? A. Yes; he mentioned that at the same time; that he had sold her property in town, and he had used the money. Q. Did he say whether or not he had told Miss Lacey of what he intended to do for her? A. Yes, sir. Q. What did he say about that? A. He said that he had promised her $5,000 and the home place, there. Q. He said he had told her that? A. He had told her that, and that he was going to make it $10,000 if she would stay and take care of him, but for me not to tell that part of it; he had already told her the other; he said that nobody else could take care of him as she did. Q. Just one other question, did he say anything about whether this arrangement

between him and Miss Lacey was in writing or not? A. No; it wasn't in writing; he said she knew that his word was good. Q. How is that? A. He said it wasn't in writing, but she knew his word was good, and he intended to put in some shape to make it so it would be good so she wouldn't have any trouble getting it if he should happen to drop off."

Fred Elias testified that decedent had told him he had received $800 for plaintiff's house, which he traded to lumbermen for lumber to go into his own new house.

The above testimony stands uncontradicted and unimpeached. It is strengthened by the admission in the answer of defendants that plaintiff rendered service under the direction of the decedent as a nurse for his wife in her last illness, and in nursing and taking care of the decedent himself in his last illness; and that they are willing and anxious that plaintiff should be amply compensated for all services rendered by her on account of the decedent or his wife. Mr. and Mrs. Zeigler died childless. The defendants are brothers and sisters and children of a deceased sister, all nonresidents of Nebraska during the time of the illness of Mr. and Mrs. Zeigler. Plaintiff in the hour of decedent's need was the one to whom he turned for services of a character which would have been hard to secure from strangers. The testimony of these witnesses clearly shows that she was faithful at every point; that she rendered services, the value of which it would be impossible to estimate in dollars and cents. Decedent knew plaintiff. She had been in his employ for 18 years at the ranch before he brought her to Columbus. He knew the kind of housekeeper and cook she was, and understood more than anyone else the character of the services which she would be able to render. He fixed the value of those services at $5,000 and the home place in Columbus. He was worth, as alleged in the petition, $80,000, and, as admitted by the administrator in his answer, about $60,000. Under such circumstances we certainly cannot say that the court erred in sustaining the value which decedent himself placed upon those services. We think the evidence

is ample to sustain the contract. The evidence to support the judgment is fully as strong, if not stronger, than that shown in *Kofka v. Rosicky,* 41 Neb. 328, *Harrison v. Harrison,* 80 Neb. 103, *Peterson v. Bauer,* 83 Neb. 405, *Hespin v. Wendeln,* 85 Neb. 172, and *O'Connor v. Waters,* 88 Neb. 224.

The question raised by the seventh assignment of error is not so difficult of solution as it might at first appear. Section 16, art. VI of the Constitution, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointments of guardians, and settlement of their accounts; in all matters relating to apprentices; and such other jurisdiction as may be given by the general law. But they shall not have jurisdiction * * * in actions in which title to real estate is sought to be recovered, or may be drawn in question." It is urged by defendants that the district court was without jurisdiction to render judgment against the administrator on account of services rendered for deceased for the amount of the money consideration to be paid therefor, and directing such judgment to operate "as an established claim against the estate of said deceased," and that the judgment to that extent is therefore void. It is argued that the county court is alone invested with the jurisdiction to determine such a matter; that the county court in this instance had actually acquired jurisdiction of the *res* by the appointment of the administrator. A number of decisions of this court are referred to in support of this contention. An examination of the cases cited will show that none of them is applicable to a case like the one under consideration. We have repeatedly held that the county court is the court of original jurisdiction in which claims against decedents' estates must be filed and adjudicated, but it will be found in every such case that there was involved a separate and distinct matter which the county court could in the exercise of its jurisdiction dispose of in its entirety. We have never held that where the matter involved is a single contract on the part of a claimant for

a consideration payable partly in money and partly by conveyance of real estate, the claimant must appeal to the county court for an enforcement of part of his contract and to the district court for an enforcement of the other part. That the district court alone could determine the contract sued upon in this case, so far as it applied to the real estate, is of course conceded. Having obtained jurisdiction for that purpose, then, under equally numerous decisions of this court, it has the power to retain it for all purposes. To hold otherwise, would be to encourage a multiplicity of suits and to require plaintiff in this case to commence her suit in equity in the district court to recover part of the consideration which she was to receive for the single agreement made and service rendered thereunder on her part, and file her claim in the county court for the other part of that consideration. This would have entailed upon her the expense of two trials, in separate courts, to establish the same fact, with the uncertainty that those courts would reach the same conclusion. Section 9, art. VI of the Constitution, provides: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide." The equitable jurisdiction of the district court is therefore beyond the power of the legislature to limit or control. It may give the district court "such other jurisdiction" as it may deem proper, but it cannot take away from such court its broad and general jurisdiction in chancery which the constitution has conferred upon it. We are not without authority to sustain us in this conclusion. In *Gilliam v. Chancellor & Murray*, 43 Miss. 437, it is held: "Where the chancery court can afford complete and adequate remedy, and, by one litigation and decree, adjudicate the rights of the parties, it may take jurisdiction over the entire subject matter, and if necessary, enjoin a party from proceeding in a suit in the probate court, when such suit only embraces part of the subject." In the opinion (p. 448) it is said: "Three important points are made by counsel: First, whether as claimed for the plaintiff in error, the jurisdiction of the

probate court, over the bequest to Mr. Gilliam is exclusive." In discussing this point the court say: "The argument is, that Mrs. Gilliam had instituted the proceeding in the probate court, against the executors to secure the legacy of $5,000; a tribunal which had, to the exclusion of the chancery court, jurisdiction to order its payment, and it was therefore an usurpation in the chancery court to stay that suit by injunction, and to withdraw from it, to itself, the subject matter in dispute. It was declared in *Blanton v. King,* 2 How. (Miss.) 856, and *Carmichael v. Browder,* 3 How. (Miss.) 252, followed by a long train of subsequent adjudications, that the jurisdiction conferred by the constitution on the probate court, was exclusive; so exclusive that the chancery court was ousted of cognizance over a large class of subjects which theretofore belonged to it. From 1832 to 1860, our books are full of cases attempting to define the boundary which separated the two courts. In truth, no subject has so much perplexed and embarrassed the appellate court as this. The chancery had unquestionably the cognizance of the rights of Mrs. Gilliam under the marriage contract, and would draw to itself all collateral subjects necessary and proper to be considered in order to a full, complete, and final adjudication of those rights. * * * The powers and jurisdiction of the chancery court were broader, more pliant, and flexible in its modes of redress, fully competent in one litigation, to adjudicate finally in respect to both the settlement and bequest, and could, therefore, well assume, as it did, entire cognizance over the subjects."

Doubtless, other authorities could be found, but the proposition appears to us so plain that we have not made further search therefor. We therefore hold that the district court had jurisdiction to hear and determine the controversy between the parties, in its entirety.

It was within its jurisdiction to order specific performance of the contract as to the money part of the consideration, to advise the county court, by the certificate which it ordered its clerk to send to that court, of the finding of the district court as to the amount which it had found due

plaintiff from the estate, which is concededly solvent, and to direct that the same be allowed as an established claim against the estate.

We deem it unnecessary to consider the assignment that the decedent was mentally incompetent, as there is an entire failure of evidence to show that his mental incompetency existed at the time he made his contract with plaintiff. At that time, and for many months thereafter, he was transacting his business as usual, and was clearly not in such mental condition as to render him incompetent to make a contract of the kind set out. Nor do we think there is any merit in the assignment that the service proved was not referable to any contract alleged. The fifth assignment, under which the defendants seek to cast a stain upon their brother, from whom they are inheriting this large estate which they did not help to earn, is not worthy of consideration. The proof utterly fails to establish it, and, even if it were established, that fact would not militate against the right of the decedent to make the contract alleged. The evidence fails to establish the sixth assignment, that the contract was the product of plaintiff's undue influence over decedent. The eighth assignment, that there was a defect of parties defendant, must fail, for the reason that it is immaterial that decedent may have been jointly interested with Mr. Gerrard in the ranch upon which plaintiff worked for 18 years before she rendered the services for which she now seeks to recover. We have limited our consideration to the services performed by plaintiff for decedent and his wife in the last illness of each. The amount which decedent agreed to pay plaintiff in money and property for those services was not, under the circumstances shown, "unconscionable." The compensation agreed to be paid for such services was not considered excessive by Mr. Zeigler, nor do we so consider it.

Fnding no error in the record, the judgment of the district court is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

JOHN A. MILLER, APPELLANT, V. GREAT WESTERN COMMISSION COMPANY, APPELLEE.

FILED MAY 14, 1915. No. 18090.

1. **Sales: CUSTOM: PRESUMPTION.** A principal who deals in a market must be presumed to deal according to the custom of that market, thus making that custom a part of his contract.
2. **———: ———: ———: REBUTTAL.** This presumption may generally be rebutted, but not where the person with whom he deals, without knowing the other to be ignorant of the usage, has performed the contract in accordance therewith.
3. **Appeal: HARMLESS ERROR: ADMISSION OF INCOMPETENT EVIDENCE.** When under the competent evidence the defendant is entitled to a verdict in his favor, any error of the court in admitting incompetent evidence is immaterial.
4. **Evidence: SUFFICIENCY.** Under the evidence in this case the court should have instructed the jury to find a verdict in favor of defendant, and therefore a judgment in defendant's favor will not be reversed upon appeal.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

C. W. De Lamatre, for appellant.

P. A. Wells, contra.

SEDGWICK, J.

This is an action to recover the net proceeds of a car-load of sheep transported from Kearney to South Omaha, March 14, 1911, for sale at the stock-yards. Cyrus A. Black, a stockman of Kearney, was consignor, and he transferred his claim to plaintiff, March 22, 1911. Defendant was the consignee, a corporation engaged in the live stock commission business at South Omaha. The validity and amount of the claim are admitted, but payment is pleaded as a defense. In 1910 Black bought from defendant two car-loads of sheep, and for the purchase price gave a note secured by a mortgage on the stock purchased. In Febru-

ary, 1911, he shipped a car-load of sheep to defendant for sale, and the net proceeds were applied on his note. Another car was consigned to defendant March 14, 1911, and with the proceeds from the sale of the sheep the note was paid in full, leaving a credit of $620.94 in Black's favor. To recover this sum the suit was brought. In the answer it is alleged, among other things, that defendant on March 14, 1911, through the Packers National Bank of South Omaha, remitted $620.94 to the Commercial National Bank of Kearney for the credit of Black, and that at his request it was applied upon a debt due from him to the Commercial National Bank of Kearney. Payment of the amount due Black was denied by plaintiff in a reply to the answer. There was a general verdict in favor of defendant, and from a judgment thereon plaintiff has appealed.

When the defendant had sold the sheep for Black and had this money in hand, the defendant sent the money to the Kearney bank as payment to Black. If this was good payment, the plaintiff of course cannot recover. The evidence was without contradiction that it was then, and had been for a long time, the custom of the commission men of South Omaha, when they made sales for parties in another town, to remit at once to the bank where the party entitled to the money transacted his business. There was no conflict in the evidence upon this point. The defendant sent the account sales to Black, showing that the money had been sent for him to the Kearney bank. Black went immediately to the bank, and was told that the money had been received and put to his credit, and had been applied upon a note which he owed at the bank. Black testified that he objected to the bank applying it on the note, but he does not testify that he made any objection to the sending of the money to the bank as payment by the defendant. Afterwards Black assigned his supposed claim against the defendant to the plaintiff, Miller. In the meantime he had made no demand upon the defendant, nor in any way questioned the right to pay him by sending the money to his bank. Miller paid $50 for the claim of nearly $700, and

then Miller brought this action against the defendant. Black testified in regard to the transaction. He admitted that there were three Black brothers, and that there was a firm entitled Black Brothers that had been doing business of this kind some years before and had shipped to these defendants. He testified that the other two brothers composed the firm, but admitted that he had worked with them, and also it appears in the evidence that the defendant supposed they were dealing with Black Brothers, as they had formerly dealt, when they sold these sheep to Black, and when they again sold them for him on the South Omaha market, and, although Black must have known of these transactions, he did not deny that he knew that the defendant supposed the dealing was with Black Brothers, as it had been before that time. Black did not deny that he knew of the custom of making remittances in this way. Under the circumstances, when the plaintiff knew that such a custom existed and used Black as a witness, if Black did not know of this custom the plaintiff should have proved that fact.

Professor Jones says: "A principal who deals in a market must be presumed to deal according to the custom of that market, thus making that custom a part of his contract." 2 Jones, Law of Evidence (1st ed.) sec. 465. In Encyclopedia of Evidence it is said: "Parties who are engaged in a particular trade or business, or persons accustomed to deal with those engaged in a particular business, may be presumed to have knowledge of the uniform course of such business; and one may be bound thereby, though ignorant, unless the other party be shown to have knowledge of his ignorance thereof." 3 Ency. of Evi. 953.

It would seem, then, that Black, in dealing with these commission men, was bound to know the custom, and if he did not want the money paid to him by remitting it to this bank he should have so instructed the defendant. He does not contend that he ever raised any such question with the defendant. Again, the defendant had a right to presume that Black knew of this custom, and, unless the defendant knew that he was ignorant of the custom, Black would be

bound by it, if the defendant performed the contract in accordance with the custom before they knew that Black was ignorant of it. "This presumption may generally be rebutted, but not where the person, without knowing the other to be ignorant of the usage, has performed the contract in concordance therewith." 3 Ency. of Evi. 954.

This defendant acted in good faith, and paid Black for this stock as there was reason to suppose he wanted to be paid, and as the law allowed payment to be made. He never questioned the right to do so until he found afterwards that this plaintiff would pay him a small sum for his supposed claim, and the court would be justified under this evidence in instructing the jury to find a verdict, as they did find, for the defendant. It is therefore not necessary to discuss the alleged error of the court in admitting the cashier's letter in evidence.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

ROSE, J., dissenting.

One of the assignments of error assails a ruling admitting in evidence a letter containing these words:

"Replying to yours of March 22, relative to C. A. Black credit, will say that we received said credit March 16th, and applied it on Mr. Black's note by his request."

The letter was dated March 23, 1911. It was written by R. D. Garrison, cashier of the Commercial National Bank of Kearney, to the Packers National Bank of South Omaha. The writer of the letter died before it was offered at the trial. In attempting to justify the ruling of the trial court, it is argued by defendant that the evidence was properly admitted as a part of the *res gestæ*. The statement that the credit was applied on a note at the request of Black was hearsay. The application of the credit was made March 16, 1911. The letter was dated seven days later. In the absence of a statute, the death of a person who made the statement sought to be proved does not of itself make hearsay testimony admissible. *Shold v. Van*

Treeck, 88 Neb. 80; 2 Wigmore, Evidence, sec. 1576. The statement was clearly too remote in point of time to be admissible as a part of the *res gestæ. Union P. R. Co. v. Elliott,* 54 Neb. 299. Moreover, the duty of the cashier in receiving funds for Black, in giving him credit therefor, and in reporting what had been done in those respects, was limited to the transaction in hand. Subsequent statements about collateral matters concerning the funds, after the credit had been given, and what Black thereafter said to do with them were not elements of the settled transaction between the two banks, and are not parts of the *res gestæ.*

It is argued by defendant that it was the duty of the Commercial National Bank of Kearney in the regular course of business to acknowledge Black's credit, and that the acknowledgment is admissible as part of the *res gestæ.* Jones, Evidence (2d ed.) sec. 319, is cited on this point, but the text answers the argument as follows: "The entries to be thus admissible should be contemporaneous with the act to be proved; that is, within so short a time thereafter as reasonably to be considered a part of the transaction, in the due discharge of duty and by persons having knowledge of the facts."

I dissent from the proposition that, with this letter excluded, the evidence would have justified a peremptory instruction in favor of defendant. The commission company, after the sale of the sheep, owed the former owner, Cyrus A. Black, the net proceeds. Its duty and the law itself required payment to him. Payment is not shown by undisputed evidence as a matter of law. As between the parties defendant acted as a fiduciary. Its principal was not a member of the firm of Black Brothers. It is not shown, as a matter of law, that defendant had knowledge of the customs of that partnership. The manner of dealing with consignments at the stock-yards did not necessarily extend to transmitting the net proceeds of a sale to an individual shipper not shown to have had actual knowledge of existing customs or to have received a former payment in accordance therewith.

The rule of law applicable to this case was stated by Judge Van Fleet as follows: "A custom to avoid an otherwise controlling rule of law must be clearly established, and the party sought to be bound thereby must either have imparted to them actual knowledge of its existence, or it must be a usage so general and well-known in the community as to give rise to the presumption of such knowledge." *Smith v. National Bank of D. O. Mills & Co.*, 191 Fed. 226.

According to Judge McCormick, the principle controlling the vital question in this case is as follows: "Whether a trade custom or usage is established by the evidence in a case, and, if so, whether it was known to a party contracting, or was so general and well established that he must be presumed to have known of and contracted with reference to it, are questions for the jury." *New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co.*, 154 Fed. 296.

To the same effect: *Bacon Fruit Co. v. Blessing*, 122 Ga. 369; *Swern v. Churchill*, 155 Ill. App. 505; *Union Stock Yards Co. v. Westcott*, 47 Neb. 300; *Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb. 554; *Bixby v. Bruce*, 69 Neb. 78. In the last case cited it was said: "One not shown to have knowledge of a trade usage confined to a particular business, which is not shown to be of such a general and notorious character that he must have been presumed to have contracted with reference to it, is not bound by such usage."

The opinion of the majority carries custom too far, allows a commission merchant to escape with too little responsibility, and invades the province of the jury. In the view most favorable to defendant, the defense of payment was an issue of fact for the determination of the jury. In the letter erroneously admitted, the hearsay statement of the cashier related to a vital issue. It may have been the controlling factor resulting in the verdict for defendant. The error was prejudicial to plaintiff, and he is entitled to a new trial. The judgment should be reversed.

JONAS MICHAEL MUSSER, APPELLANT, V. MICHAEL P. MUSSER, APPELLEE.

FILED MAY 14, 1915. No. 18603.

1. **Bills and Notes: GENERAL DENIAL: ADMISSIBILITY OF EVIDENCE: CONDITION.** In an action upon a promissory note, if the defendant alleges, and produces evidence tending to prove, that the note was given upon a certain specified condition, evidence that the condition related to another item, and not to the note in suit, is competent under a general denial.
2. ———: **CONDITION: INSTRUCTION.** In such case an instruction that the defendant must prove by a preponderance of the evidence that the note in suit was given upon the specified condition properly submits that question.
3. **Appeal: LAW OF THE CASE.** The decision of this court of a question of law becomes the law of the case, and will not ordinarily be changed upon a second appeal. The rule also applies to questions of fact, if the evidence is substantially the same on the second trial.
4. **Trial: REFUSAL OF INSTRUCTIONS.** The judgment of the trial court will not be reversed for refusing to give instructions which detail at length transactions between the parties and contain matters that might mislead the jury, or if they do not contain matters necessary to a proper understanding of the issues involved and not substantially included in the instructions given.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

A. W. Crites and *J. E. E. Markley,* for appellant.

John J. Sullivan and *Louis Lightner, contra.*

SEDGWICK, J.

The facts in general are stated in our opinion upon a former appeal. 92 Neb. 387. There are many peculiar circumstances connected with this transaction. The defendant, then an elderly man, sold a farm in Iowa to his nephew, and took the note of plaintiff and his wife secured by mortgage upon the land for $10,500 on five years' time, interest at 5 per cent. The plaintiff and his wife took

possession of the land, and it is not suggested that they failed to get full value for their note and mortgage. The note was upon a printed blank, which recited the Citizens' National Bank, Charles City, Iowa, as the place of payment. When the mortgage became due five years later, it appears that a pen had been drawn through the words "National" and "Charles City, Iowa," and the words "Rushville, Nebraska," had been written in. Other words in the printed blank had been likewise changed, so as to make the interest 5 per cent. payable annually, instead of 8 per cent. payable semiannually. It is agreed that the alterations as to the interest were in accordance with the contract and were made before the execution of the note. But when the note was presented for payment this plaintiff protested that the place of payment had been changed after the execution and delivery of the note. He claimed that for this reason, and because this defendant had not forwarded the note and mortgage, together with a release thereof, to the bank at Charles City, he had lost a desirable sale of the land, and so had been damaged. This latter claim of this plaintiff led to a considerable controversy between the parties. Finally the defendant went to Charles City to adjust the matter, and the note in suit was given. The note and mortgage which this defendant held against the plaintiff and his wife then amounted to $11,281.55, and the plaintiff afterwards paid $11,000 on the same.

The plaintiff contends that the agreement of adjustment of the controversy between them was that this defendant should give him the note sued upon, $3,000, on one year's time, for the damages which the plaintiff had sustained because of the alteration of the note secured by mortgage, and defendant's failure to forward the release, and that the $281.55 balance of the mortgage note was to be paid by plaintiff, if the defendant found upon examination of his correspondence that he (the defendant) was not at fault in failing to forward the mortgage release to Charles City in time so that the plaintiff could complete his contract for the sale of the land. The defendant contends that the

$3,000 note in suit was conditioned that it should be paid only if the correspondence showed that this defendant was at fault. If the $3,000 note was to be paid at all events, it would seem to have been more usual to have indorsed that amount upon the note and mortgage which the defendant held. These were transactions between relatives, and they present many unusual features, if regarded as from a strictly business standpoint. To use a printed blank for a note of this magnitude that was to run for five years and make it show erasures and alterations on its face is perhaps unusual among business men, but some of these erasures, at least, were understood and agreed upon by the parties. Again, to give and receive a promissory note for so large an amount conditioned upon the existence of a fact which was left entirely to the maker of the note to determine is unusual, but perhaps not more so than to give an absolute agreement to pay at a future time damages of this nature, which, if justly due from defendant, would reduce the amount that he could fairly recover on the note and mortgage which he held. If he owed this plaintiff unconditionally $3,000 on account of his dealing with this note and mortgage, that amount should naturally have been allowed thereon. There are other peculiarities connected with these transactions which might well be left to the consideration of the jury.

The plaintiff does not explain very fully how he was damaged by defendant's failure to send a release. If the note and mortgage were payable at Charles City, as he supposed, and they could compute the exact amount of the incumbrance, why did they not deposit that amount in the bank at Charles City for defendant's mortgage? He does not explain why such a usual course of proceeding was not followed in this case. Why the defendant was under obligation to send a release before the mortgage was paid or the money deposited is not very fully explained.

The plaintiff requested the following instruction: "The defendant claims that the note in suit was given upon a condition, in substance to the effect that it should be payable only if defendant should on his return home find a

letter from plaintiff asking defendant to send such a release of the mortgage covering the $10,500 note, by January 1, 1903, to enable plaintiff to complete a sale he had contracted to make of a part of the mortgage land to one F. E. Raisty, on which a warranty deed was to be delivered on that day. Plaintiff claims that said condition only applied to the sum of $281.55, surplus of the $10,500 mortgage over and above the sum of $11,000; the plaintiff must show his claim that the condition applied to the note in suit, rather than to the $281.55 surplus, by a preponderance of the evidence in the case. If the evidence is equally balanced on this question, or preponderates in favor of plaintiff, your verdict must be in favor of the plaintiff."

The plaintiff now contends that the court erred in refusing to give this instruction, and also several other requests of the same nature. The defendant alleged in his answer, and testified as a witness, that the condition mentioned in this request for instruction applied to the $3,000 note in suit. To this allegation of the defendant the plaintiff replied with a general denial, and to support that general denial testified that the condition referred to related only to the $281.55 which was to remain unpaid on the note and mortgage. This evidence was of course competent under the general denial. It tended to prove that the condition did not relate to the note in suit, and therefore, when the court on its own motion instructed the jury that the plaintiff must prove by a preponderance of the evidence that the condition did relate to the note in suit, the issue was properly presented to the jury. Defendant was required by that instruction to prove that the condition related to the note in suit, and not to any other matter. This was the issue tendered by the general denial, and was presented by this instruction.

The court submitted to the jury the question as to whether there was any consideration for the note sued upon. This the plaintiff now complains of. The instruction complained of submits to the jury all of the contentions of the plaintiff as to the consideration of the note

sued upon, and the only ground upon which the instruction could be complained of is that the evidence of the consideration for the note as claimed by the plaintiff is so clear and uncontradicted that the court should have decided the question, and should not have submitted it to the jury.

In our former opinion we said: "The district court also committed no error in overruling a motion of plaintiff for a peremptory instruction to find in his favor. While the execution and delivery of the $3,000 note was admitted, the vital issue remained whether there was a consideration for the note, and whether it was executed and delivered upon the condition that it should only be payable in the event that defendant found a letter requesting him to send the release of mortgage before January 1, 1903. * * * There were really only two issues in the case: First. Was there a good consideration for the $3,000 note? Second. If there was such a consideration, was the note delivered upon a condition?" There is no such substantial change in the evidence upon either of these points as to require a different conclusion. The instructions relating to the question of a consideration for the note, which were requested by the plaintiff, are set out at length in the brief, and repeat quite at length many of the circumstances and transactions between the parties. Some of these requests contain statements that might have misled the jury, and we cannot find that any matters requested to be given to the jury, that are not contained in the instructions of the court, were so necessary to a proper understanding of the issue as to require a reversal because of their refusal.

As we have already indicated, a delicate and difficult duty was devolved upon the jury. The questions in dispute were peculiarly matters for the jury, and upon the whole instructions the case seems to have been fairly submitted. The judgment of the district court is therefore

AFFIRMED.

HAMER, J., not sitting.

VINNIE G. PARRISH, APPELLEE, V. RAY HODGES, APPELLANT.

FILED JUNE 5, 1915. No. 18122.

1. **Bastardy: APPEAL: OBJECTION.** In a bastardy proceeding, an objection which is so general in terms that the court's attention is not drawn to the point sought to be raised will be disregarded when urged upon appeal.
2. ———: ———: **CONFLICTING EVIDENCE.** In a bastardy proceeding, only a preponderance of the evidence is necessary to a conviction, and a verdict rendered on conflicting evidence will be sustained unless it is clearly wrong.
3. ———: ———: **HARMLESS ERROR.** An improper question asked in cross-examination of defendant in a bastardy proceeding, to which an objection is sustained, is not ground for reversal, unless it appears that prejudice resulted to defendant therefrom.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

John A. Miller, for appellant.

J. M. Easterling and *J. E. Morrison, contra.*

MORRISSEY, C. J.

Plaintiff brought this action against defendant under sections 357-364, Rev. St. 1913, by filing a complaint before a justice of the peace, charging defendant with being the father of her bastard child. He was found guilty by the jury, and the court entered a judgment ordering him to pay, in instalments, for the support of the child $939, and defendant has appealed.

Omitting the formal parts, the complaint is as follows: "Vinnie G. Parrish * * * on her oath deposes and says that at all times herein stated she was and now is an unmarried woman and a resident of the said county and state; that on the 10th day of January, 1912, she was delivered of a bastard male child, and that said Ray Hodges is the father of said child. She further avers that said child is still alive."

Defendant points out that the complaint does not allege that at the time of conception plaintiff was unmarried. This precise matter was before the court in *Campion v. Lattimer,* 70 Neb. 245, and was decided adversely to the contention of the defendant. But defendant attempts to differentiate between *Campion v. Lattimer* and the instant case, because, in the former, objection to the complaint appears to have been made for the first time in this court, while in the instant case objection was made in the court below. The objection was in the following language: "Defendant * * * refuses to plead to said amended complaint and objects to the sufficiency thereof, and to the form of the amended complaint, and for the reason that the action is entirely changed from the original complaint filed herein." This objection was too general; it was not sufficient to challenge the court's attention to the point sought to be made. The proof shows that complainant had not been married at the date of the birth of the child, or the making of the complaint, and this assignment will not be considered further.

It is next contended that the evidence is insufficient to sustain the verdict. The defense was in the nature of an alibi, and several witnesses, mostly relatives, were called by defendant to sustain his theory; but, this being in the nature of a civil action, a preponderance of the evidence is all that is required to sustain the verdict. The jury passed upon the conflicting stories told, and the finding of the jury will not be disturbed.

Misconduct of plaintiff's attorney in the trial is assigned as error. But after a careful reading of the record we are not prepared to say that defendant was prejudiced in the matter of his defense by any act of plaintiff's counsel. The baby was in court during the trial, and this question was asked: "You say that little baby over there is not your child?" Objection was sustained, and the question was not answered. Defendant now contends that this was prejudicial. Jurors are not so easily influenced that a question of this kind will affect their verdict. The jury knew there was a baby, and its mere presence in the

courtroom and this reference to it cannot be said to be so prejudicial as to warrant a reversal of the judgment.

Complaint is made because plaintiff's counsel propounded certain questions to defendant and his witnesses on cross-examination, but objections to these questions were either sustained or the answer was adverse to plaintiff, and defendant was not prejudiced thereby.

It is next contended that the court erred in instructing the jury, but an examination of the record fails to show any error in this regard. Finally, it is said that the judgment is excessive. Defendant is now 21 years of age, and, so far as the record shows, is in good health. The judgment is to be paid in small semiannual instalments, without interest, if paid when due. There is no evidence to show that the mother has any means, yet she is charged with the care and education of this child. Her burden seems the greater of the two, and the judgment is

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

BARTON BOLES, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18127.

Street Railways: PERSONAL INJURIES: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. Where it is claimed that a would-be passenger signaled for a street car to stop at a regular stopping place, and that the car slowed down to such a degree as to constitute an invitation to get on, and he was injured while attempting to board the car, the question of negligence in so doing is one of fact for the jury.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

C. S. Allen and *Field, Ricketts & Ricketts,* for appellant.

W. B. Comstock, John E. Lowe, George W. Miller and *Harry A. Reese, contra.*

MORRISSEY, C. J.

Plaintiff was injured while attempting to board one of defendant's street cars running between Lincoln and Havelock. He was then 14 years of age, and was employed in a drug store in the business section of Lincoln. Arriving at the intersection of Dudley and Twenty-seventh streets, he awaited the arrival of a car to take him to the place of his employment. In the petition it is alleged that, as one of defendant's cars approached this intersection, it slowed down and stopped, thereby giving him a tacit invitation to become a passenger; that in attempting to board the car he took hold of the handhold with one hand, and had stepped with one foot onto the running board, when the car was negligently and violently jerked forward, and he was thrown to the ground, and the rear wheels of the car passed over his right foot, crushing it so badly as to necessitate the amputation of the greater part thereof. The answer is in the nature of a general denial, coupled with an allegation of negligence on the part of the plaintiff.

On the trial the plaintiff did not attempt to prove that the car came to an absolute stop, but only that it slowed up to such a degree as to amount to a tacit invitation to the plaintiff to board it. There was a verdict and judgment for plaintiff, and defendant has appealed, assigning three separate grounds of error: First, that the *allegata et probata* do not agree. This point was not called to the attention of the trial court by any proper assignment in the motion for new trial. But, waiving this defect in the record, and considering the assignment on its merits, we do not find that there was such a variance between the pleadings and the proof as to prejudice the defendant, or as to warrant reversal of the judgment. The opening statement of counsel for each party is preserved in the record, and this shows that counsel for plaintiff made the following statement: "The evidence will show I think beyond question that the car either came to an absolute stop, or so

near it that a man could walk right along with it and keep up with it, and the evidence will show that under the circumstances it was a situation that would invite any man to attempt to board it." Counsel for defendant, in making his statement immediately following, told the jury that as the car passed this intersection it was probably moving at the rate of 8 to 12 miles an hour, and he produced several witnesses who testified that the car did not stop or slacken its speed. No complaint was made at the trial that defendant was taken by surprise or misled in the preparation of its defense. This court has repeatedly held that "a variance between *allegata et probata* will not be held to be prejudicial, requiring a reversal of the judgment, where it appears that the party complaining was not actually misled or surprised to his disadvantage." *Ittner Brick Co. v. Killian,* 67 Neb. 589; *Parker v. Omaha Packing Co.,* 85 Neb. 515.

It is next contended that the evidence is insufficient to sustain the verdict. The car causing the injury is claimed by defendant to have been a special car sent out in the early morning for the purpose of carrying workmen from the city of Lincoln to the Burlington shops in the city of Havelock; that it was on its return from Havelock when this accident occurred; and that it was not engaged in local business, but that there was a car running immediately behind it to handle the local traffic. However this may be, it is conclusively shown that this car had picked up passengers before arriving at Dudley street, and that only one block to the north, and within full view of the plaintiff, it picked up a passenger, Mr. Mayer. Plaintiff testified that when the car reached the intersection of Dudley and Twenty-seventh streets it slowed up until it was moving so slowly that he could walk along side of it and keep up with it. He says that when he saw the car coming he walked out from the curb to the car line, and stood two or three feet from the car line waiting for the car; that the motorman saw him and slowed up to a rate about as fast as he could walk; it was a summer car with open sides and a running-board along its entire length; that he

let about one-half of the car go by, and then, seeing an empty seat, he took hold of the rod and stepped up with his feet on the running-board, and as he went to step into the body of the car it was suddenly jerked and he was thrown off. In this he is corroborated by Mr. Mayer, who had boarded the car one block from where this accident occurred. Mayer says that plaintiff stepped upon the running-board opposite the seat which he occupied, and about one foot from him; that as plaintiff got on the conductor signaled the motorman to go ahead; that the car gave a lurch; that the acceleration of speed was so sudden that it threw witness a little from his seat; and that plaintiff was thrown off. There was other testimony going to show that the car slowed up, and that as plaintiff stepped upon the running-board it was suddenly jerked forward. There is a sharp conflict in the evidence as to the rate of speed the car was moving when it crossed Dudley street and at the time plaintiff attempted to board it, estimates running all the way from four or five miles an hour to eight or ten miles an hour, and there is also a conflict as to whether or not there was any sudden acceleration of the rate of speed. The motorman was a witness for defendant, and testified to having "heard a noise on the foot-board, and the very next instant I heard the hind wheel run over something." This "something" was the boy's foot. In this connection it may be remarked that the witness Mayer testified that when he boarded the car only a block from where plaintiff was injured "the car slowed up for me and I jumped on." This was in plain view of the plaintiff, and it illustrates the method employed in at least one instance in receiving a passenger.

We are asked to hold that it was negligence *per se* to attempt to board a moving car. *Hunterson v. Union Traction Co.*, 205 Pa. St. 568, is the leading case cited by defendant in support of this contention. This opinion was rendered by a divided court, and seems to be against the weight of authority. In *Cicero & Proviso Street R. Co. v. Meixner*, 160 Ill. 320, and a number of authorities therein cited, it is held: "To board or depart from an electric

car while in motion is not negligence *per se.*" This court has held in *Omaha Street R. Co. v. Craig,* 39 Neb. 601, that whether alighting from a moving car constitutes negligence or not is a fact to be determined by the jury, taking into consideration all of the circumstances in evidence in the case. In principle there is no difference between alighting from a moving car and attempting to board one, and, if the person is injured while attempting to board a slowly moving car at a regular stopping station, the question of negligence is one of fact for the jury.

Defendant contends that it was gross negligence to attempt to board the car while it was moving, but, if the testimony of the boy is correct, it was not the speed of the car at the time that he stepped upon the running-board that caused the accident, but the sudden application of power and the acceleration of speed before he was given an opportunity to enter.

The court instructed the jury on the "last clear chance doctrine," and this instruction is assigned as error. But in the state of the record before us this instruction seems to have been properly given. Even assuming that the boy was guilty of negligence in jumping upon the running-board while the car was moving, yet, if the motorman knew that he was there, and his testimony indicates that he did, it would be his duty, so far as consistent with the safe and practical operation of the car, to allow him to reach a place of safety, and if in place of doing this he suddenly and negligently threw on the power and caused the car to lurch forward, and plaintiff was thereby injured, defendant would be liable, and we think the instruction was properly given.

The record being free from error, the judgment is

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

PATRICK RODDY, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18150.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

B. P. Waggener, J. A. C. Kennedy and *Philip E. Horan,* for appellant.

Thomas F. Roddy and *Arthur A. Bischof, contra.*

BARNES, J.

This is the second appeal in this case. When the former appeal was considered, it was held that the judgment, so far as it related to the present cause of action, should be reversed because the evidence was insufficient to show that any freight train of the defendant company had passed plaintiff's premises prior to, or at the time, the fire started which destroyed plaintiff's trees or timber, and that *how* the fire originated was merely a conjecture. 91 Neb. 75. When the cause was remanded to the district court, further evidence was introduced on the second trial, which, if believed by the jury, was sufficient to sustain the present verdict. The judgment of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

FRED GIERTS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18167.

WATERS: DAMAGES. *Reed v. Chicago, B. & Q. R. Co.*, 86 Neb. 54, and *Reed v. Chicago, B. & Q. R. Co., ante*, p. 19, followed.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Byron Clark, E. E. Whitted and *W. S. Morlan,* for appellant.

O. E. Shelburn, contra.

BARNES, J.

This is an appeal from a judgment for damages by flood waters sustained by plaintiff on account of the negligent construction of the defendant's railroad grade in the valley of Sappa creek near plaintiff's farm in Harlan county, Nebraska.

The question of the negligent construction of defendant's railroad grade and embankment at the place in question was first decided in *Reed v. Chicago, B. & Q. R. Co.*, 86 Neb. 54. It was again determined in *Reed v. Chicago, B. & Q. R. Co., ante*, p. 19. The instant case was brought to recover damages sustained by the flood waters which caused the damages to Reed's property in the case last cited. Plaintiff and Reed owned adjoining farms. All of the questions raised by defendant in this case were disposed of by the opinions above referred to, which we are constrained to follow. The judgment of the district court is therefore affirmed without further discussion.

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

LEO SHIMICK, APPELLEE, V. CUDAHY PACKING COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18174.

1. **Appeal: PERSONAL INJURIES: INSTRUCTIONS.** Where the questions of the negligence of the defendant and the contributory negligence of the plaintiff in a personal injury suit are submitted to a jury under proper instructions, the verdict will not be set aside unless clearly wrong.
2. **Master and Servant: INJURY TO SERVANT: QUESTIONS FOR JURY.** Questions as to the nature and extent of the injury, the disability resulting to plaintiff from the accident, and the amount of the recovery, are ordinarily questions for the determination of the jury.
3. **Excessive Damages.** The evidence set out in the opinion examined, and *held* that a judgment for $7,500 based thereon is excessive.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed as modified.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

William R. Patrick and *C. J. Southard, contra.*

BARNES, J.

Appeal from a judgment of the district court for Douglas county against the Cudahy Packing Company and Charles Rooney, in an action brought by Leo Shimick to recover damages for a personal injury sustained by him while employed by the packing company.

It appears that the plaintiff was working as a steam fitter in putting the glycerine plant of the company in working order. On the 4th day of January, 1912, plaintiff was ordered to repair the super-heater, which was located in a corner of the building used by the company as a glycerine plant. Plaintiff and his helper stripped off the asbestos covering of the super-heater in order to ascertain where it leaked. When the asbestos was removed it was found that it would be necessary to put pressure on

the heater in order to find the leaks. Plaintiff went out of the building in order to inform the foreman of that fact. The room was so full of steam that objects therein were not distinguishable. When plaintiff returned, in passing to the place where the heater was situated, he fell into an open trap or catch-basin in the floor of the building, and thus sustained the injuries for which he has brought suit.

It clearly appears from the evidence that plaintiff was familiar with the room, but there is no evidence that he had ever seen the catch-basin or knew of its location. It was ordinarily protected by a plank covering, over which one could pass without knowing what he was on or knowing that it was at all dangerous. It appears that defendant Rooney, who was the foreman in charge, had that morning ordered some of the workmen to clean out the catch-basin. The cover had been removed and set back against the wall, leaving the basin open. The hole thus left exposed in the floor was about four feet square and from five to six feet deep. The direction traversed by plaintiff in going to consult with Rooney did not require him to pass over or near the catch-basin, but in returning he took a little different course and walked directly into the hole. As he fell into the catch-basin he struck his right arm and forearm on the opposite cement edge of the hole, and thus received his injuries. It appears that the steam in the building was so dense that the hole could not be seen, and persons working near it could not be distinguished. It is claimed by appellant that when plaintiff started to find the foreman he was warned of the danger by one of the men. The testimony on that point, however, is somewhat conflicting and unsatisfactory. Witness Bowman claims to have said: "Look out for the hole, it is open;" and plaintiff, in reply, said, "I know." It appears, however, that there was an open sewer trench running along the side of the room from north to south about one foot wide and from one foot to 15 inches deep. It is plaintiff's contention that this is what he understood was meant by the warning; that this was the hole that he knew was

there. It seems fairly clear that the plaintiff had no knowledge of the existence of the catch-basin into which he fell.

The questions as to defendant's negligence and the alleged contributory negligence of the plaintiff were submitted to the jury under proper instructions and the verdict so far as these questions are concerned, must be held to be conclusive. It is contended that certain fixed objects near and surrounding the catch-basin rendered it practically impossible for plaintiff to have fallen into it without striking some of them, but it is sufficient to say that plaintiff walked into the open hole and was pulled out by the persons who were there present, and this question requires no further consideration.

It is strenuously urged by the appellant that plaintiff's injuries were slight and trivial, and that therefore the judgment is so excessive as to require a reversal. The record on this question is very voluminous and the evidence is somewhat conflicting. We think it clearly appears that plaintiff was quite severely injured. It was shown that in September, preceding the date of his fall into the catch-basin, plaintiff had received an injury to his right forearm or wrist, known as a Colle's fracture; that he had fully recovered from that injury, and went to work for the defendant company at his trade as a steam fitter on the 18th day of December, 1911; that he experienced no difficulty in performing his labors. It also appears that he was a first-class workman. When he fell into the catch-basin he struck his wrist and forearm on the cement edge of the hole. His arm and wrist were bruised and sprained; the skin was abraded, and the flesh was some swollen and discolored. He also received an injury to his arm and shoulder. The defendant's house physician considered that the injury was so severe as to require him to place the wrist and forearm in splints. The injury became more painful, and on the second day thereafter plaintiff called in Dr. Chaloupka, who was his family physician, to attend to the injuries and to relieve his pain. The doctor removed the splints and ascertained that the plaintiff's injuries had been properly treated. He also ascertained that

the arm was much swollen, bruised and discolored. He put new dressings and splints on the injured wrist and forearm, and continued to treat plaintiff for two or three times a week during the folowing ten weeks, after which time he only administered occasional treatment. The doctor testified that at the time of the trial, which was about 15 months after the injury was received, plaintiff's recovery was slow; that his arm did not seem to regain strength; that he could not shut his hand. The motion of his forearm was poor, and there was some considerable ankylosis of the shoulder joint; that plaintiff's wrist was stiff, and he cannot lift his arm to a height of over 45 degrees, so that the use of his hand and arm have been impaired to the extent of 50 or 60 per cent. of the normal; that there are adhesions of the tendons, and that plaintiff is not able to follow his occupation as a steam fitter. The testimony of Dr. Chaloupka was fully corroborated by the evidence of Dr. Koutsky and others. Some X-ray negatives of the plaintiff's injured hand and forearm were produced in evidence, which showed an ankylosis or fusion of the carpal bones of the hand, a fracture of the styloid process of the right ulna, and a partial severing of two of the tendons of the plaintiff's right wrist. In fact, it was made clear that plaintiff had sustained a severe injury. On the other hand, defendant availed itself of the testimony of medical experts whose evidence tended to show that plaintiff's injuries were slight, and one of the witnesses testified that in his opinion plaintiff was malingering, but the great weight of all of the evidence destroys that theory of the defense. It seems clear to us that plaintiff was entitled to a substantial judgment. It is contended, however, that the judgment, which was for $7,500, is grossly excessive, and, in view of the fact that there will be some improvement in plaintiff's use of his arm and hand, we think the judgment should be reduced to $5,000, with interest from the date of its rendition by the district court. As thus reduced, the judgment is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

RAYMOND VICTOR PETERSON, APPELLANT, V. CHARLES W. SPENCE ET AL., APPELLEES.

MORRIS KENNETH PETERSON, APPELLANT, V. CHARLES W. SPENCE ET AL., APPELLEES.

FLOYD BERT PETERSON, APPELLANT, V. CHARLES W. SPENCE ET AL., APPELLEES.

FILED JUNE 5, 1915. NOS. 18179, 18180, 18181.

Appeal: HARMLESS ERROR: INSTRUCTIONS. The giving of an erroneous instruction is error without prejudice, where it appears that the verdict of the jury is the only verdict sustainable under the evidence.

APPEAL from the district court for Lancaster county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. M. Stewart, T. F. A. Williams and *J. A. Brown*, for appellants.

T. J. Doyle, Morning & Ledwith and *A. G. Ellick, contra.*

BARNES, J.

The three minor sons of Charles Peterson commenced separate actions by their next friend, Emma O. Fosbury, against Charles W. Spence, a licensed saloon-keeper doing business in the village of Havelock, and his surety, the Bankers Surety Company of Cleveland, Ohio, to recover the sum of $5,000 damages alleged to have been sustained by each of the plaintiffs on account of the sale of intoxicating liquors to their father.

It was alleged in the petitions that on or about the 16th day of April, 1909, and thereafter every day continuously down to April 15, 1910, said defendant gave and furnished to said Charles Peterson intoxicating, malt, spirituous and vinous liquors, which were drunk by him, whereby they did debauch and induce and cause said Charles Peterson to become a habitual drunkard, and by reason of their said acts such habitual drunkenness and debauchery has continued to this time, and the said Charles Peterson is now,

by reason thereof, a confirmed drunkard, and he has thereby been permanently impaired in health, and rendered shiftless and indolent, and his capacity to labor and earn money thereby impaired, and has thereby been caused to squander his money in drinking and drunkenness, by reason of which he has failed and neglected to support, educate, nurture and care for his said sons during said period and down to the present time, and has abandoned them and left them without a home, maintenance or support, and without the parental care, nurture and education required by their tender years, for all of which they are compelled to rely upon the charity and benevolences of strangers. Plaintiffs prayed judgments for $5,000 in each case.

Defendant's answer in each case was a general denial. The three cases were consolidated. The trial in the district court for Lancaster county resulted in judgments for the defendant, and the plaintiffs have appealed. It is contended that the verdict of the jury is not sustained by the evidence, but is contrary thereto.

Mrs. Fosbury testified, in substance, that she had charge of the Peterson children; that Peterson paid regularly for their care and attention until after May 17, 1910. This was after the end of the license year in which it was alleged that defendant furnished liquor to Peterson. Her testimony tended to show that up to the end of the license year Peterson was attentive to the children; that he was very affectionate, and furnished whatever she desired for their education and support. She also testified that she never saw Peterson when he appeared to be under the influence of liquor.

The marshal of the village of Havelock was called as a witness for the plaintiffs, and testified that he had known Peterson for a good many years; that he knew him when he worked in the railroad shops at Havelock, and also observed him during the license year of 1909-1910; that he saw Peterson drink an occasional glass of beer; that he was always sober and attending to his business. It further appears from the testimony that Peterson had a lunch

counter in the corner of the saloon belonging to Spence; that he attended to his business well and made good money, some of the witnesses putting his earnings at $150 a month. The testimony of the other witnesses shows that Peterson was what was termed a moderate drinker, that is, that he took a glass of beer occasionally; but the whole trend of the testimony was that Peterson was not in the habit of getting intoxicated, and was always able to attend to his business. Witness Smith's testimony was to the same effect as that given by the village marshal. To the same effect also was the testimony of Earl Jones, who was called as a witness for the appellants. The testimony also shows that during the license year when he had a lunch counter in the saloon Peterson drank less than he ever had before; that he only took an occasional glass of beer. There is evidence in the record which shows that Peterson went to Omaha twice during that year, and once made a trip to Lincoln, and one of the plaintiffs' witnesses testified that at those times Peterson drank beer, and on one occasion he was accompanied by a woman. The witness testified that Peterson was a good fellow to be out with, and that he spent his money freely, and that he had a good time, but that Peterson only drank beer on those occasions.

It appears that, after the license year of 1909-1910 expired, no license was granted in Havelock, but that saloons were licensed in Lincoln. Of course, during the next license year Peterson obtained no liquor of any kind from the defendant.

After Peterson closed up his lunch counter business he was out of employment, and went to Horton, Kansas, Sedalia, Missouri and Norfolk, Nebraska, at which places he worked at his trade as boiler maker some considerable time. In 1911 he came back to Havelock and opened a restaurant in partnership with a man named Vanderventer. He attended to that business in an efficient and industrious manner, and ran the restaurant until about the 1st of January, when he sold out to a Mr. Curry. He afterwards left Havelock, and had only occasionally returned for a short time. It appears that at those times Peterson was

sober and in good physical condition. The testimony shows that Peterson could not obtain work at the Havelock shops for the reason that he had been a strike sympathizer, and hence he was obliged to go to other places in order to obtain employment at his trade as boiler maker.

As we view the record, there is nothing in the evidence which shows, or tends to show, that the liquor furnished and sold to Peterson by the defendant in any manner contributed to Peterson's failure to support his children. We are therefore of opinion that the verdict was sustained by sufficient evidence.

Appellants complain of the giving of instruction numbered 3, given by the court on his own motion, and particularly that part of the instruction which is, in substance, as follows: That plaintiff is required to prove that, by reason of the excessive use of intoxicating liquors, the said Charles Peterson contributed less toward the support of his boys, the plaintiffs in these cases, than he had previously done, and finally abandoned them, and wholly failed and neglected to support and provide for them. This part of the instruction is conceded to be wrong.

In a suit on a liquor dealer's bond, it is only necessary for the plaintiff to show that during the license year the person alleged to have been injured by the sale of liquor furnished less support to his children than he previously did, or that during the license year he deprived his children of any of the means of support they would have received from him but for his drinking during such period. Partial loss of support entitles a child to recover without proof of total loss of support from the father or of his abandonment of his child. The giving of this instruction would entitle the appellants to a reversal of the judgment, were it not for the fact that, as we view the case, there is no evidence in the record which would even tend to support a verdict in plaintiffs' favor. This being so, the giving of the instruction complained of was error without prejudice.

The judgments of the district court are therefore

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

H. W. HUFF, APPELLANT, V. W. D. ARNETT, APPELLEE.

FILED JUNE 5, 1915. No. 18205.

1. **Justice of the Peace: CHANGE OF VENUE.** In a civil action before a justice of the peace, the filing of an affidavit by defendant for a change of venue for bias of the justice does not of itself deprive the court of jurisdiction, if there is no other justice of the peace in the county to whom the case can be transmitted.
2. **———: REFUSAL OF CHANGE OF VENUE: REMEDY.** In such case, the defendant's remedy is not error to the district court, but is by appeal.

APPEAL from the district court for Wheeler county: JAMES R. HANNA, JUDGE. *Affirmed.*

A. L. Bishop, for appellant.

T. D. Meese and *J. R. Swain, contra.*

BARNES, J.

One W. D. Arnett commenced an action in forcible entry and detainer against H. W. Huff before T. P. Hardesty, a justice of the peace of Wheeler county. On the return day of the summons both parties appeared, and the defendant filed an affidavit for a change of venue, alleging that he could not, as he verily believed, have a fair and impartial trial on account of the bias and prejudice of the justice. A change of venue was about to be granted, when, on inquiry, it was ascertained that there was no other qualified justice of the peace in Wheeler county. The defendant's motion for a change of venue was overruled, the cause was tried, the defendant making no defense, and the justice of the peace entered a judgment for the plaintiff. Huff prosecuted error to the district court, where the judgment of the justice was affirmed. Thereupon Huff brought the case to this court by a petition in error.

There is no provision in the statute for bringing a civil action from the district court to this court by a petition

in error. The case, however, will be treated as though it were brought here on appeal.

It is the appellant's contention that the justice was deprived of jurisdiction by the filing of the affidavit, and the district court erred in affirming the judgment of the justice of the peace. Section 8404, Rev. St. 1913, provides, among other things: "Any defendant may apply for and obtain a change of venue, by filing an affidavit in the case, made by the defendant, his or her agent, or attorney, stating that the defendant cannot as affiant believes have a fair and impartial trial before such justice, on account of the interest, bias and prejudice of such justice against the defendant, and by paying costs, * * * whereupon it shall be the duty of the justice immediately to transmit all of the papers in the case, together with a certified transcript of all the proceedings before him, to the next nearest justice in his county." For the reason that there was no other justice of the peace in Wheeler county, the motion was properly overruled, and the petition in error was dismissed by the district court. In this there was no reversible error. The appellant has mistaken his remedy. Under the circumstances, he should have gone to trial, and, if the judgment was adverse to him, he should have taken the case to the district court on appeal. The judgment of the district court is therefore

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

JOHN E. DORSHIMER, APPELLEE, V. J. W. HERNDON, APPELLANT.

FILED JUNE 5, 1915. No. 18210.

1. **Continuance.** A litigant who is present in court when his case is set for trial, and departs without leave and goes to another state without informing his attorney where he may be found when his case is about to be tried, is not entitled to a continuance as a matter of right.

2. **Attorney and Client: DISCHARGE: COMPENSATION.** Where an attorney makes a contract with his client to perform certain services for an agreed sum, and performs a part of those services, and the client, without any valid excuse, discharges him or prevents the fulfilment of the contract, the attorney is entitled to recover the full contract price.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Martin & Bockes, for appellant.

Patterson & Patterson and *John E. Dorshimer, contra.*

BARNES, J.

Appeal from a judgment of the district court for Merrick county. The action was brought by John E. Dorshimer against the defendant, J. W. Herndon, to recover an attorney fee of $200. The suit was commenced in the county court, where the plaintiff had judgment, and the defendant appealed to the district court. On the trial in that court the plaintiff was again successful, and the defendant has appealed to this court.

The plaintiff's petition was based on an oral contract by which the defendant employed the plaintiff, who is a practising attorney, to assist him in the defense of a certain action brought against the defendant in the district court for Merrick county. The defendant was a resident of Maryville, Missouri. It was alleged in the petition that defendant agreed to pay plaintiff the sum of $200 for his services in defending the suit, and agreed to send the plaintiff one-half of that amount immediately on his return to his home in Missouri. The remainder was to be paid within a short time thereafter, or as the litigation progressed. It appears that the plantiff entered upon the employment and prepared the necessary papers to remove the cause to the federal court in accordance with defendant's instructions; that the clerk of the district court required the defendant to pay the costs which had already accrued, and the clerk of the federal court required the payment of certain advanced costs before filing the case in

that court. The plaintiff wrote to the defendant asking him to remit the necessary fees, and also the $100 which defendant had agreed to send him on his return to Missouri. Defendant failed to comply with plaintiff's request, and, without any explanation for his conduct, employed another attorney. The plaintiff brought suit to recover the amount of his compensation according to the terms of the contract.

When the case came on for trial in the district court defendant was absent, although he was in court in person at the commencement of the term. His attorney filed an application for a continuance, supported by his own affidavit. The court refused to continue the case. To this the defendant's attorney excepted. On the trial the plaintiff made his proof, and, the defendant being absent and offering no testimony, the trial court instructed the jury to return a verdict for the plaintiff. It is defendant's contention that the court erred in overruling the motion for a continuance. The affidavit filed for that purpose will not be set forth in the opinion. It is sufficient to say that defendant knew the cause was set for trial during the term of court at which he was present, and that he understood the order, yet he left the court without leave, and, instead of going to his home, he went to South Dakota, without informing his attorney of that fact or leaving any information as to where he might be found when called upon to respond to a notice of the approaching trial. The district court, therefore, did not err in refusing to grant the continuance asked for.

It is also contended that the court erred in directing a verdict for the plaintiff. It is argued that the contract was abrogated, and the plaintiff could not recover the fee which defendant agreed to pay him; that, having sued upon an express oral contract, he could not recover as for a *quantum meruit*. It may be conceded that plaintiff was not entitled to recover on a *quantum meruit*, and that contention will receive no further consideration; but we cannot agree with defendant that plaintiff could not recover on the express contract. The agreement, as shown by the testimony, was clear and explicit. The plaintiff entered

upon the performance of his services, and the defendant, after part performance, without any excuse or cause whatsoever, refused and neglected to perform his part of the contract, and without any explanation employed another attorney. The plaintiff at all times was ready and willing to perform his part of the agreement. It has been often held that in such case the attorney is entitled to recover his agreed compensation. In 4 Cyc. 984, it is said: "When an attorney makes a contract to perform certain services for an agreed sum, and the client, without any valid excuse or reason, discharges him or prevents the fulfilment of the contract, the attorney is entitled to recover the full contract price." In the case of *City of Detroit v. Whittemore,* 27 Mich. 281, it was said by Judge Cooley: "An attorney employed to carry a suit through for an agreed sum has a vested right to the compensation when he accepts and begins the service, and he cannot be lawfully deprived of it except by his own consent or through his own default or misconduct. If he is discharged from the employment before the service is completed, he may recover the whole sum, * * * because of the manifest impossibility of making an apportionment of the services and compensation, when the parties themselves by their contract expressly abstained from making any, and may in fact be said to have agreed that none should be made." In *Moyer v. Cantieny,* 41 Minn. 242, it was held: "A recovery may be had of the stipulated price, although before the plaintiff's efforts were concluded the defendant assumed to discharge him from the service. The plaintiff was entitled to the benefit of the contract, and the entire compensation agreed upon for the entire service was not apportionable."

As we view the case, the trial court did not err in directing a verdict for the plaintiff for the full compensation of $200. The judgment of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

The following opinion on motion for rehearing was filed September 20, 1915. *Rehearing denied.*

BARNES, J.

The appellant has filed a motion for rehearing, and contends that the opinion overlooks the fact that plaintiff unqualifiedly admitted that he had quit the service of the defendant. A re-examination of the record shows that the plaintiff testified that, when defendant paid him the fee agreed upon, he was still ready and willing to perform the services. He said: "When he pays me my fee, I am ready to serve him."

It is next contended that our opinion in this case is in direct conflict with the rule announced in *Shevalier v. Doyle,* 88 Neb. 560. Appellant insists that the rule in that case should be adhered to; that a different rule should not be announced without expressly overruling that case. In *Shevalier v. Doyle,* the contract of employment was terminated; Doyle had accepted his discharge; and, in the suit brought by Shevalier to cancel the mortgage given to secure Doyle's fee, the reasonable value of the service was alleged and the attorney was allowed to recover the same. In the case at bar the contract had not been abrogated. The defendant simply neglected and refused to pay plaintiff the fee agreed upon by him. In this case plaintiff sued to recover the compensation agreed upon. He manifested his willingness to perform the services if defendant would pay him his fee. The testimony shows that the defendant employed another attorney and ignored plaintiff. The cases are easily distinguishable, and the motion for a rehearing is

OVERRULED.

HAMER, J., not sitting.

GRACE H. RUSTIN, APPELLEE, V. ÆTNA LIFE INSURANCE COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18004.

1. **Insurance: EXTENDED INSURANCE: COMPUTATION.** The amount of extended life insurance, where assured dies during default in the payment of an annual premium, having made a loan upon his policy, should be computed according to the terms of the contract, if valid and unambiguous.
2. **———: PROVISION FOR LOAN: CONSTRUCTION.** Money loaned to the insured under the policy loan contract described in the opinion constitutes "an indebtedness to the company against the policy," as this phrase is used in the contract.
3. **———: PROVISION FOR EXTENDED INSURANCE: CONSTRUCTION.** A life insurance policy provided that if default is made in the payment of premium after premiums have been paid for three years or more, and there is no indebtedness to the company against the policy, it shall be extended as temporary insurance for the full sum insured during a specified time, but that, if there is such an indebtedness, the amount of extended temporary insurance shall be reduced in the proportion which such indebtedness bears to the cash surrender value. *Held*, where a loan made to insured had not been paid at the time of default, the beneficiary was entitled only to temporary insurance in such proportion.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed with directions.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Mahoney & Kennedy, contra.

LETTON, J.

From a judgment of the district court in favor of the plaintiff on a policy of life insurance issued on the life of her husband, Frederick Rustin, defendant appeals. At the close of the trial in the district court, there being practically no disputed questions of fact, each party moved for a directed verdict. The motion of defendant was over-

ruled, and that of plaintiff sustained, and judgment rendered accordingly.

The sole question involved in this appeal is the amount of defendant's liability under the policy of insurance, which, with a loan agreement secured thereby, constituted the entire contractual relations between the parties. The policy was issued November 23, 1903, for $10,000, in consideration of an annual premium of $294.40, payable annually in advance. The principal sum is made payable "on the surrender and discharge of this policy either at the end of the policy year falling nearest to age eighty-five, if the insured is then living, or, on receipt and approval of proofs of the death of the said insured during the continuance of this policy, and any indebtedness to said company on account of this policy or any premium for the current year remaining unpaid shall first be deducted therefrom." It is further provided: "This policy is issued and accepted subject to the conditions, provisions, and benefits printed on the reverse of this page, which are hereby referred to and made a part hereof." One of these is: "If any subsequent premium be not paid when due then this policy shall cease and determine subject to the nonforfeiting features hereinafter described." A grace of 30 days for the payment of premium is also allowed. Rustin paid three annual premiums, but made default in the payment of the fourth annual premium, which was due on November 23, 1906. He died September 2, 1908, within the period for which he was entitled to extended insurance under the nonforfeiture provisions of the policy hereinafter considered. On July 9, 1906, and before default in the payment of the premium, Rustin borrowed from the defendant the sum of $210, payable on demand, and executed a loan contract therefor, signed by himself and Mrs. Rustin. In this contract they acknowledged the amount of the note, with interest, "to be an indebtedness to said Ætna Life Insurance Company, on account of contract No. 60269, issued by said company on the life of Frederick Rustin, which contract, with all right, title and interest therein, and all benefit and advantage

to be derived therefrom, is hereby assigned to said company as security for this indebtedness." It was also provided therein that if the note or any interest thereon "remains unpaid thirty days after it becomes due the right to pay further premiums under said contract shall cease." Other provisions with respect to the rights of the parties after default of the payment of the note or the interest are contained therein; but we consider that they are not material in this controversy, since no demand had been made and no default had occurred in the obligation of this contract at the time that Rustin defaulted in the payment of the fourth annual premium on the policy. The rights of the parties as to extended insurance and the amount thereof must be determined, therefore, by the conditions of the policy contract alone.

The controversy is not as to the length of the period of extended insurance, but it is as to the amount of insurance to which Rustin was entitled during the period of extension. Plaintiff claims, and the district court held, that the full amount of $10,000, less the indebtedness of $210, with interest, as provided in the loan contract mentioned, is due, while defendant asserts that under the provisions of the policy the amount of extended insurance to which the policy holder is entitled is $1,356.

The provisions in the policy which are decisive of the issues are as follows:

"Extension of Full Sum Insured.

"Section 4. If default occurs in the payment of any premium under this policy after the premiums have been paid for three years or more, this policy shall then cease as to the right to pay further premiums, but shall, if there is no indebtedness to said company against it, be extended as temporary life insurance for the full sum hereby insured during the time specified in the following table, reckoned from the time when the first unpaid premium became due, at the expiration of which time it shall wholly cease and be void, except for the endowment value, if any, shown by the next column of said table payable only at the expi-

ration of the endowment term if the insured is then living. Should the death of the insured occur within three years after the time when the first unpaid premium fell due and while this policy is in force as temporary life insurance, there shall be deducted from the amount otherwise due from said company the premiums that would have been paid had there been no default in the payment of premium, with interest thereon.

"Paid-up Policy. Cash Surrender Value.

"In lieu of such extended insurance a paid-up nonparticipating stock policy will be issued for the amount shown by the following table, or, at the expiration of the fifth or of any subsequent policy year, said company will pay the amount of cash shown by the following table; provided in either case that this policy be surrendered to said company and a written application made for said paid-up policy or cash value within three months after the time when the first unpaid premium became due. Said paid-up policy shall bear the date of its issue and be due and payable in event of death as herein provided, or at the expiration of as many years from its date as there are years of this endowment term less the number of full years expired under this policy.

"Loan.

"Section 5. After the expiration of three years from the date of this policy, and before default in the payment of premium, said company will loan upon the same the amount shown by the following table."

"The figures given in this table are for one thousand dollars of insurance, and the values for insurance of a greater or less amount can be calculated therefrom. The table is based on the assumption that there is no indebtedness against the policy and that all the premiums have been paid to the end of the policy year for which the value is given.

"Directions Concerning the Use of the Table.

"If there is any indebtedness to the company against the policy, the loan or the cash surrender value will be reduced by the amount of said indebtedness, and the amount which shall be extended as temporary life insurance (also the endowment value, if any) or the amount of paid-up policy to be issued will be reduced in the proportion which said indebtedness bears to the cash surrender value hereof.

"For a loan or cash surrender value the policy must be unincumbered by the interest of minor children and a valid loan note or surrender papers must first be executed under such regulations as are prescribed by the company.

"In determining the extension, the paid-up policy, the cash or loan value, premiums paid for entire years only will be considered."

The policy table of values, on the original policy, is shown at the right of and directly opposite to the above "Directions Concerning the Use of the Table."

"Table of Values per $1000 of Insurance.

Non-participating
Life (End't at 85). Issued at age 34.
Premiums 20 yrs.

At End of Year	Extended Insurance			Paid-up Policy	Loan	Cash Value
	Yrs.	Days	Endowment Value			
3	2	321		$ 89	$21	
4	5	167		148	40	
5	7	342		206	61	$68

While the cash surrender value after three premiums have been paid is not stated in the table, it is admitted that it amounted to $234 on this policy.

Rustin made no demand within three months after default for a paid-up policy, and under the above provisions

the policy became automatically extended for the time fixed in the table, to wit, 2 years and 321 days. The plaintiff contends that the provisions upon the face of the policy for the payment of $10,000 at its maturity and the further provision that "any indebtedness to said company on account of this policy or any premium for the current year remaining unpaid shall first be deducted therefrom" are inconsistent with the provisions with respect to the deduction of indebtedness found in the quoted sections, and that the only manner in which they can be reconciled is to treat the expressions "indebtedness against the policy" and "indebtedness on account of the policy" as referring to different kinds of debt, and that, if the indebtedness is one "on account of the policy," it "is simply to be deducted from the face of the policy and the balance paid." We see no reasonable ground for taking this position. The expressions, "indebtedness to said company on account of this policy," "indebtedness to the company against the policy," the "company will loan upon the" policy, seem to us to include such an indebtedness as is here involved, and such as is contemplated both on the face of the policy and in the quoted provisions on the back of it. Other provision is made on its face for the deduction at maturity of "premiums for the current year remaining unpaid." It is conceded by plaintiff that no default in the payment of the principal or interest of the loan occurred. None of the contingencies in the loan contract, arising on default, have any bearing on the question and the case must be decided by a consideration of the policy alone.

The basic principle upon which so-called "old line" level premium life insurance is conducted requires that the insurer shall collect each year from the insured an amount over and above the actual current cost of carrying the insurance of each individual in order to provide a fund for the future increased cost due to advancing age. This fund is usually denominated the "reserve," and is often regulated by statute. In the policy under consideration this term is not used, but the principle applies. This is the fund from which loans are made, surrender values are paid in cash,

or which is used to carry term insurance in case of default for the length of time set forth in the table.

Three contingencies are provided for in the policy: First, the amount that the company shall pay at maturity when there is no default and no indebtedness; second, what it shall pay when there is no default and an outstanding indebtedness; third, the amount to be paid when default has been made and a part of the reserve has been withdrawn by a loan on the policy. When these three conditions are distinguished, the purport of the policy seems plain, and the solution becomes easy, though, as in all life insurance contracts, the language necessarily is technical.

The agreement upon the face of this policy to pay $10,000 at death assumes and is based upon the idea that no default has been made in the payments provided for by contract. The company agrees to pay $10,000 at maturity, but "any indebtedness to said company on account of this policy" shall first be deducted therefrom, so that, if no default had been made in the payment of the premiums, the $10,000, less $210 and interest, would then be due. The provision as to a deduction of unpaid premiums for the current year evidently refers to premiums payable in instalments, or as to which grace has been allowed, and not to any premiums as to the payment of which an absolute default has been made, since it is also provided that the policy "shall cease and determine subject to the nonforfeiting features."

Those conditions upon the back of the policy which are involved here have reference to the rights of the assured after a default has been made in the payment of premiums. If there is no indebtedness, the cash surrender value or reserve in the hands of the company is used to carry extended insurance for the full amount named in the policy for the length of time which it will pay for as a single premium at current rates, or, if the policy holder desires, he may take a paid-up policy for the amount it will purchase, or it may be surrendered to him in the form of cash, each of which amounts is set forth in the table. If the policy holder withdraws the whole of the reserve in the

form of cash surrender value, this ends his insurance; if he borrows and thus withdraws a portion, when he makes default in the payment of premium, the remainder is used to purchase extended insurance, or, as it is expressed in the policy, "the amount which shall be extended as temporary life insurance * * * will be reduced in the proportion which said indebtedness bears to the cash surrender value," which is the same thing. When, as in this case, nearly 90 per cent. of the reserve is taken out, then the amount of insurance must inevitably be reduced in the same proportion. The automatic operation of this provision of the policy is set in motion by a default in payment of the premium and by a failure, within three months after default, to elect to take a paid-up policy instead of extended insurance. The time for which the insurance will be extended, or the amount of the paid-up insurance, is definitely fixed and determined in the policy in all cases where it was possible so to fix and determine the time and amount in advance, but in all cases of indebtedness the continued or paid-up insurance is dependent upon the amount of the indebtedness. The fact of an indebtedness to the defendant does not forfeit the right to continued or paid-up insurance, but simply leaves the amount of the paid-up insurance, or the amount to be extended, dependent upon a computation to be made when the amount of the indebtedness is determined. *Taylor v. New York Life Ins. Co.*, 197 N. Y. 324. This case considered a similar provision to that in the policy in suit here. If after default Rustin had elected to take a paid-up policy, it would not have been for $890, but for the amount that the money left in the company's hands after paying his loan would purchase.

The fact that a loan has been made does not alter the conditions. Such a loan is not like an ordinary loan, secured by mortgage or personal security. It is in the nature of a withdrawal of the reserve, *pro tanto*, for the reason that, under the terms of the contract, the insured is entitled at any time to demand and receive a loan, and

he alone has the option of deciding whether he will ever repay it or not. Of what avail would it be to the insurance company to collect the amount of the loan when the borrower could at once, by virtue of the contract, demand and receive a new loan for the same amount? The practical operation of the loan is to withdraw the reserve, at the option of the policy holder as to repayment.

The testimony shows that, as soon as the net amount of the reserve in the hands of the company was ascertained by computation, the amount of insurance for the time specified in the policy was determined, the loan was paid, and an entry made upon the books of the defendant showing the satisfaction of the debt and the extension of the insurance for the amount fixed by the contract for the specified period. Similar action by an insurance company and policy provisions having the same effect were upheld in *Sharpe v. New York Life Ins. Co.*, 5 Neb. (Unof.) 278. Under somewhat similar provisions the opinion in *Rye v. New York Life Ins. Co.*, 88 Neb. 707, holds that there is no uncertainty in the contract, and that, since the assured had borrowed from the company the full amount of the reserve before his death, there was no fund in the hands of the company to carry extended insurance, and that therefore the policy lapsed upon default. A rehearing was granted, and the policy held to be in full force at the time of death upon another ground, but the principles announced in this opinion were not set aside nor departed from. *Bryant v. Mutual Benefit Life Ins. Co.*, 109 Fed. 748, *Omaha Nat. Bank v. Mutual Benefit Life Ins. Co.*, 84 Fed. 122, *Dibrell v. Citizens Nat. Life Ins. Co.*, 152 Ky. 208, *Rife v. Union Central Life Ins. Co.*, 129 Cal. 455, and *Blalock v. Empire Life Ins. Co.*, 13 Ga. App. 486, construe policy provisions which, while couched in language slightly different, are governed by the same principles as those in the policy here. Contract provisions of the nature of these have been inserted in policies within recent years, either voluntarily, by insurance companies of the highest class, or involuntarily, by reason of statutory enactment in a

number of states. These provisions are for the benefit of the insured, since by replacing his reserve before default, even after sickness has intervened, and his physical condition has become such as would preclude him from obtaining new insurance, his insurance stands as if no loan or withdrawal ever had been made, and, if no default is made, on maturity the debt is deducted from the amount payable on the face of the policy. It is a well-known fact that most policies of life insurance entered into prior to the last fifteen or twenty years contained drastic provisions as to forfeiture whereby the insured lost his entire reserve if he made default in the payment of premiums. It is a matter of common knowledge that, under the pressure of public opinion, such provisions have been gradually relaxed. In an examination made of the policy provisions of 51 representative insurance companies, it is shown that all these companies have such nonforfeiture provisions. Yale Readings in Life Insurance, p. 262. It is also pointed out (pp. 272-274) that statutory provisions have been adopted in more than 15 states which provide for the ascertainment of the amount or time of extended insurance on default and for the deduction of indebtedness, on practically the same plan as provided for by this policy. Indeed, the new Insurance Code of Nebraska, in subdivision 9, sec. 3238, Rev. St. 1913, contains a like requirement for policies issued after it takes effect.

Courts should interpret life insurance contracts in such a way that they can in all instances be carried out, and fair dealing and good faith should be upheld both for and against the insurer. We must remember that, if we take an undue amount of the assets of the company to pay one policy holder, we are thereby lessening the protection afforded to all other policy holders. The amount tendered by the amended answer seems to be the amount due under the contract, and the judgment should be for that sum.

The judgment of the district court is therefore reversed and the cause remanded, with directions to render judgment against defendant for the sum tendered in its

amended answer and for costs up to that time; subsequent costs and costs in this court to be taxed to plaintiff.

REVERSED.

MORRISSEY, C. J., not sitting.

FAWCETT, J., dissents.

HAMER, J., absent and not voting.

JOHN RUSSO, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18097.

1. **Appeal:** CONFLICTING EVIDENCE. Where the evidence is sufficient to support the verdict, and the jury has found for the plaintiff on conflicting evidence, it will be considered on appeal that the evidence in his behalf states the true facts.
2. **Master and Servant:** INJURY TO SERVANT: LIABILITY. Plaintiff suffered injuries resulting from the negligent manner in which lifting tongs were attached by A, an employee of defendant, to a rail which was being unloaded, and from a negligent order by defendant's foreman that he hurry and take hold of the rail in order to guide it to the ground. *Held*, that since the negligent order given by the foreman concurred with the negligence of A, the defendant is liable, and it is not material whether A was a fellow servant of plaintiff.
3. **Appeal:** EXCLUSION OF EVIDENCE. A judgment will not be reversed on account of the erroneous exclusion of evidence, if the party complaining is permitted at another point in the trial to prove the same facts.
4. **Damages.** The amounts provided for in the employers' liability act (Laws 1913, ch. 198) as compensation for damages are arbitrary sums fixed by the legislature, and may not be taken as a standard of comparison or recovery in an action for injuries suffered before its enactment.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

John L. Webster and *W. J. Connell*, for appellant.

Gurley, Woodrough & Fitch, contra.

LETTON, J.

Action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in ordering the plaintiff, one of its workmen, to do an alleged dangerous act. Plaintiff recovered, and defendant appeals.

The facts alleged by the plaintiff are that on September 14, 1912, he was employed by the defendant as a member of what was called the "screw gang," which was engaged in sawing, laying and lining rails on defendant's track, and at that time the defendant was laying new rails on a double track, replacing the old tracks. A crane car and a car-load of rails were brought to the place where the new track was being laid. These rails were hauled on a flat car operated by an electric motor. The crane was operated by an electric motor and was used to unload rails. Plaintiff was directed by the foreman to leave his work of lining rails and to help unload the rails from the flat car. He was also ordered to take hold of the east end of the rail which was being unloaded for the purpose of guiding it to the place where it was to be laid. The rail was about 31 feet long, and weighed about 3,000 pounds. It was alleged that, in order that the rail be unloaded in a reasonably safe and prudent manner, it was necessary that the crane hook be attached to the center of the rail, so that it would be balanced when lifted, and when so balanced it could be guided with safety by the men guiding the rails, and that the defendant negligently caused the hook to be attached to the rail so that it would not be balanced when lifted, and attached it in a loose, insecure and unsafe manner so that it had an insecure grip on the rail, which was very dangerous for any one to take hold of for the purpose of guiding it to the ground; that the danger was well known to defendant and its foreman, although not known to plaintiff or obvious to him, or in any way explained to him; that, in obedience to the order of the foreman, plaintiff took a firm hold on the west end of the rail in order to guide it; that the rail was lifted by the crane, and that, by reason of the fact that it was improperly and insecurely

hooked, the hook failed to hold the same, allowing the rail to fall upon plaintiff, knocking him to the ground, breaking the bones of his arm, necessitating its amputation.

The answer is a denial of the acts of negligence alleged, and a plea that whatever danger was incident to the unloading of the rails was obvious and was known to the plaintiff, and that he could have avoided the injury by the exercise of reasonable care. It is also alleged that all persons engaged in the operation of unloading were fellow servants, and that the injuries received were due to plaintiff's own negligence and that of his fellow servants.

The evidence on behalf of the plaintiff shows that he was an Italian, 33 years old, who had been working for some time on the street railway track. His duties were to lay rails, straighten them up, and cut off the ends when necessary to make them fit; also to draw the spikes and take up old rails. On the day of the accident he was working under a foreman named Christianson, laying a new track near the old one. A crane car came up with a flat car carrying rails. The foreman called to Russo to help his coworkman Ruberti unload the steel. The rails were unloaded by being grasped by a pair of tongs operated by the crane, the proper method being to place the tongs about the middle of the rail so that it would balance when lifted, to swing it clear of the flat car, and then for one man stationed at each end to take hold of the rail and guide it to the ground. As plaintiff reached the flat car the foreman told him to hurry because there was a passenger car waiting. The tongs were attached by a workman on the flat car in such a manner that the rail did not balance, and as it swung out and as plaintiff was reaching up for it, it slipped from the tongs, struck him and threw him down, and fell upon and crushed his left arm so that it became necessary to amputate it near the shoulder.

It seems plain that the accident occurred through the carelessness of Anderson, one of the two men working with the crane, in placing the tongs at such a point upon the rail that it failed to balance, or nearly do so, and the con-

current negligence of the foreman in hurriedly directing the plaintiff to take hold of a rail which was in such a dangerous and insecure condition. Plaintiff stood on the ground below the level of the grade close to the flat car, the floor of which was higher than his head. The foreman stood back in such a position that the manner in which the rail was attached and swung was, or should have been, apparent to him in the exercise of ordinary care. The rail was a curved rail, which is shown to be more difficult to unload than an ordinary straight rail and to demand more care.

The evidence for defendant tended to prove that the tongs were placed very close to the center of the rail; that it was necessary with heavy rails that, if they were swung from the center, the ends should be taken hold of by men upon the ground so as to prevent their tipping and sliding, and that this rail was properly swung from the top of the flat car, and that this rail would not have slipped if Ruberti had taken hold of one end of it while the plaintiff was taking hold of the other. It also tended to prove that the men employed in the screw gang, the spike gang, those unloading rails, and the crane crew, which was engaged in bringing rails from the yards and attaching the tongs and operating the crane, all belonged to what was known as the steel gang, and were fellow servants, and were all under the direction of foreman Christianson.

Twelve errors are assigned by the defendant as grounds for reversal. The first is that the court erred in permitting a witness to testify that he had seen a rail fall out of the hook on former occasions, and that the foreman was standing where the witness supposed he could see it. We see nothing prejudicial to the defendant in the admission of this testimony. There is no proof that the foreman knew of the fact, and, even if he had known, we cannot see how the testimony could have affected defendant adversely.

The next assignment is that the court erred in excluding testimony of the witness Thomas to show that Anderson was in the steel gang under the same superintendent as Russo and this witness. These questions were ruled out

as not being proper cross-examination. The defendant was permitted at another point in the trial to show these identical facts, and therefore cannot have been prejudiced.

After the same witness had testified as to the make up of the screw gang and the spiking gang and the steel gang, the defendant sought to show on cross-examination that the crane men belonged to the steel gang. This was objected to as not proper cross-examination. The court then said: "He has stated what he considers the steel gang,—the ten men there." It is strongly urged that it was error for the court to put its interpretation upon the previous answers of the witness and to exclude this testimony. The witness had stated a moment before that Christianson was foreman of the spike gang and the steel gang. When he was asked, "Did he have the whole steel gang * * * or just the spiking gang?" he answered, "Ten men; * * * that was all," and that Russo was one of the ten. This complaint is therefore without merit.

The next assignment is that the court erred in refusing to direct a verdict for the defendant. There was sufficient testimony to go to the jury on the point whether the failure to properly attach the tongs and the negligent order given by the foreman were the proximate cause of the injury. The evidence is not so clear that the failure of Ruberti to take hold of the rail was the cause of the accident as to justify the court in directing a verdict upon the ground that it was caused by the negligence of a fellow servant.

The remaining assignments apply to the giving of certain instructions. A number of these are in no wise subject to the criticisms of defendant. Whether the giving of the others was erroneous depends upon the evidence in the case, and, as we have already determined that there is sufficient evidence to sustain the verdict, the instructions are not subject to the objections made.

We find it unnecessary to consider and distinguish cases cited by the defendant, for the reason that the facts of each particular case determine the question for that case. A number of cases are collected in the opinion in the case of *Union P. R. Co. v. Doyle,* 50 Neb. 555, which express the

views of this court as to who are vice-principals, and the liability of an employer for injuries resulting from a negligent order given by one holding such a position.

The negligent order of the vice-principal to take hold of the rail which was improperly and negligently secured by Anderson was the proximate cause of this injury, and the case falls within the rule of *Rathjen v. Chicago, B. & Q. R. Co.*, 85 Neb. 808.

It is complained that the judgment for $6,910 is so excessive as to appear to have been the result of passion or prejudice; that under the employers' liability act the compensation for the loss of an arm would be $1,290, and that therefore the verdict and judgment is five times as large as should have been awarded. The employers' liability act sets an arbitrary standard of recovery fixed by the legislature. The amounts provided for therein may be in part predicated upon the assumption that prompt payment of a smaller sum made without the delays, costs and expenses of prolonged litigation is better for all parties than fuller compensation subject to such contingencies; but of this we are not advised, and are not entitled to consider the motives of the legislature. Russo is a young man who will be compelled to go through life with only one arm. He was earning $624 a year. The loss of his arm has made it impossible for him to continue in his former line of employment or to perform any other work requiring the use of both arms, his pain and suffering were intense, and after the arm had been amputated a subsequent operation became necessary to remove decayed bone. A similar verdict was supported in the recent case of *Henry v. City of Lincoln*, 97 Neb. 865.

We find no prejudicial error, and the judgment of the district court is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

MICHAEL SHANNON, APPELLEE, V. SWIFT & COMPANY ET AL., APPELLANTS.

FILED JUNE 5, 1915. No. 18134.

1. **Master and Servant: INJURY TO SERVANT: NEGLIGENCE: QUESTION FOR JURY.** Plaintiff was ordered by his employer to pour caustic soda into a washing machine while the same was in motion. As a result of so doing, some of the substance splashed into and injured his eye. *Held*, that the question whether, under all the circumstances in evidence, such a direction constituted negligence, and whether the plaintiff knew, or by the exercise of reasonable care on his part ought to have known, that it was dangerous so to do, were questions for the jury under proper instructions.
2. ———: ———: ———: ———. In his testimony plaintiff denied knowledge of the dangerous and corrosive nature of caustic soda, though he admitted he knew it was always handled with tongs while in the dry state, and with buckets or dippers when liquefied, and that it was used as a washing fluid and in the making of soap. *Held*, that it was not erroneous to submit to the jury the question whether or not it was negligence on the part of the master to fail to warn him of the dangers incident to the use of that substance.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Greene, Breckenridge, Gurley & Woodrough, for appellants.

Herbert J. Connell and *James C. Kinsler, contra.*

LETTON, J.

This was an action against Swift & Company and Thomas Smith, its foreman, for damages resulting from the splashing of caustic soda into the eye of plaintiff from a washing machine which he was operating in the laundry of defendant. He recovered a judgment for $2,500 against both defendants, from which judgment they appeal.

The evidence on behalf of plaintiff is to the effect that there were two washing machines in the laundry which

were used to wash the greasy clothes of the workmen. Each machine consisted of an outer stationary box or jacket in which a copper cylinder perforated with holes revolved, part of the time in one direction and part of the time in the reverse. Soap and liquid caustic soda were placed in the water in which the cylinder revolved, and the clothes were placed in the cylinder. The cylinder and the reversing action were operated by gears and cogs which were out of order, so that it was necessary that they be tied together with a piece of rope or string. This was frequently broken and often required to be retied. At the time plaintiff was employed he was told by the foreman that one Frank Horcka, who was working in the laundry, would show him what to do. Horcka showed him how to place the clothes in the cylinder, and told him to put in the soap and caustic soda in the machine while it was stationary. One day when Horcka was absent the foreman ordered him not to put the soda into the machine until it was in motion. He continued to operate the machine in this manner, putting the soda in while it was in motion, for about four or five weeks. As he was pouring it in at the time of the accident, a sudden rattling noise occurred at the gears by reason of the rope giving way. He involuntarily glanced at them, and as he turned back to look at the cylinder, which was jerking and moving irregularly, some caustic soda splashed into his eye, causing severe pain. He afterwards was treated by two or three physicians. The eyeball became attached to the eyelid, and it became necessary that an operation be performed by a specialist to separate it and graft mucous membrance into the eyelid. He still suffers to some extent from double vision on account of a partial attachment of the eyeball which still exists.

For the defendants, the foreman denied that he had ever instructed plaintiff to use the soda in the machine, either when in operation or not, and testified that the only purpose for which caustic soda was used in the plant was to make soap to be used in the machines.

The principal allegations of negligence in the petition are the defective condition of the machine, failure to warn plaintiff of the dangerous nature of the caustic soda, and a negligent order to pour it into the machine while in motion. The answer denies that the machine was defective, avers that the risks of the service were obvious and were assumed, and that the injury was produced by plaintiff's carelessness in using soda instead of soap in the manner described. At the conclusion of the evidence the district court, in substance, told the jury that, if they found from the evidence that the foreman directed the plaintiff to put the solution of caustic soda into the machine while it was in motion, and if they found that this was negligence, and that the negligence was the proximate cause of plaintiff's injuries, or that, if the plaintiff had proved to them by a preponderance of the testimony that he did not know the dangerous character of such a solution, and that the defendants knew or should have known this, and failed or neglected to notify him of the danger, and that such failure was negligence which was the proximate cause of the injury, they should find for the plaintiff.

Defendants complain that the question of whether plaintiff assumed the risk of the use of caustic soda was not submitted to the jury on account of the refusal of the court to give instruction No. 2 requested by it, but the court of its own motion told the jury: "If you find from a preponderance of the evidence that it was dangerous to pour caustic soda into the cylinder while it was in motion, and that this was known to the plaintiff, or that, by the exercise of reasonable care on his part, he ought to have known that it was dangerous, and with this knowledge he poured the solution in the cylinder while it was in motion at the time he was injured, then it would be your duty to find a verdict for the defendants in the case." This covers the point so far as required in the case, because if plaintiff ought to have known it was dangerous to thus use the soda the result of the instruction is to hold that, under the law, plaintiff assumed the risk of using it. The mere fact that the court did not use the technical words "as-

sumed the risk of injury in the use of caustic soda in the manner testified to by him," employed in the rejected instruction tendered, is not material.

Defendants contend that there was not sufficient evidence that the plaintiff was unaware of the corrosive nature of caustic soda to justify the submission to the jury of the question whether it was the duty of defendants to warn him of the dangers of its use. Plaintiff denied knowledge of its dangerous character, and this is only rebutted by his admission on cross-examination that he knew it was always handled with tongs when dry, or with buckets or dippers when liquefied, and that it was used as a washing fluid and in the making of soap. He might be aware of all these facts, and yet not know its powerful effect as a solvent of living tissue, and that it would sear and destroy the mucous membrane when it came in contact with it. We see no error in the submission of the question. *Adams v. Grand Rapids Refrigerator Co.*, 160 Mich. 590, 19 Am. & Eng. Ann. Cas. 1152, note, p. 1154; *Flaherty v. Powers*, 167 Mass. 61; *Elliff v. Oregon R. & N. Co.*, 53 Or. 66; *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475. See, also, note 35 L. R. A. n. s. 679.

Defendants say: "It will be seen that the only controverted material fact in the case is whether Smith told Shannon to pour caustic soda into the machine while it was moving." As to this there is a direct conflict in the evidence, and the verdict settles the fact for this review that he was so ordered. Does the evidence warrant a finding that such a direction was negligent? This is really the crucial point in the case. Defendants insist that it was not, and that it was therefore error to refuse to direct a verdict in their favor. The question is not free from doubt, but, considering all the facts established as testified to by the plaintiff, we believe that it was a question for the jury to determine.

A few other errors are assigned, but we find no reversible error on any of the rulings complained of.

It is complained that the verdict is excessive. The judgment is for $2,500. Considering the pain and suffering of

defendant, his loss of three months' time, and the fact he is still suffering from double vision, we think the verdict is not so excessive as that it must have been the result of passion or prejudice.

The judgment of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

ÆTNA LIFE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT, V. NATIONAL UNION FIRE INSURANCE COMPANY, APPELLEE; EBENEZER D. HARRIS, APPELLANT.

FILED JUNE 5, 1915. No. 18141.

1. **Jury: RIGHT TO JURY TRIAL: ACTION ON INSURANCE POLICY.** Where, in an action by a mortgagee against a fire insurance company based upon a mortgage clause in the policy, the insurer pleads fraud on the part of the mortgagor in procuring the insurance, but offers to pay the mortgagee the amount due under the mortgage clause, which is sufficient to satisfy the mortgage debt, upon condition that it be subrogated to the mortgage, and where to a cross-petition filed by the mortgagor, who seeks to enforce the policy, the insurer pleads that the policy is invalid for the same reason, the question whether the policy is valid should be first determined, and upon that issue it is error to refuse the mortgagor a jury trial.
2. **Insurance: FRAUD: SUBROGATION.** Where in such a case the defense of fraud in procuring the insurance is established, and the insurer has paid the full amount of the mortgage to the mortgagee, it may be subrogated to the rights of the mortgagee in the mortgage; otherwise the insurer is not entitled to subrogation.
3. ———: **ACTION ON POLICY: ATTORNEY'S FEES.** If in such case the insured recover upon the policy, he will be entitled to a reasonable attorney's fee to be taxed as costs; but if the defense of fraud is established, and the recovery is by the mortgagee alone upon the independent contract in the mortgage clause, and the evidence shows that no attorneys were employed by the mortgagee, and that it has incurred no liability in that respect, it is not erroneous to refuse to allow the mortgagee attorney's fees.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed with directions.*

Mockett & Peterson, for appellant.

Stewart, Williams & Brown, A. G. Wolfenbarger and *C. Petrus Peterson, contra.*

LETTON, J.

This action was brought by the Ætna Life Insurance Company against the National Union Fire Insurance Company and Ebenezer D. Harris. Harris was the owner of a house on which a policy of insurance for $1,500 had been issued by the National Union Fire Insurance Company, hereinafter termed the insurer. He had borrowed from the Ætna Life Insurance Company, hereinafter termed the mortgagee, $1,500. A mortgage clause was attached to the policy in the usual form, providing that, in case of loss, the policy was payable to the mortgagee "as its mortgaged interest may appear." The house burned down, and the insurer refused to pay the loss on the ground that the policy was obtained by fraud and misrepresentation.

This suit was brought by the mortgagee on the policy, making Harris a party defendant, alleging that he claimed the surplus due over the mortgage debt and refused to be made a plaintiff, and asking judgment for the amount due upon the mortgage and a reasonable attorney's fee. An amended answer was filed by the insurer, pleading fraud and misrepresentation in the procurement of the policy, that Harris is the real party in interest, and offering to pay the mortgage debt upon condition that the mortgagee would assign the mortgage to it. A demurrer to the defense of fraud and misrepresentation was sustained by the court. Harris filed an answer and cross-petition, asking practically the same relief as the mortgagee, and denying the allegations of fraud and misrepresentation. The insurer brought the amount of the mortgage debt into court, and tendered it to the mortgagee on condition that it be subrogated to its rights under the mortgage. On motion of the insurer, and over the objections of the other parties, the cause was transferred from the law docket to the equity docket. Harris then filed a motion demanding a

jury trial of the issues between him and the insurer, for the reason that the pleadings between them raised no equitable issues. Plaintiff also requested a jury trial. These requests were refused, and the trial proceeded to the court without a jury. The court found that the mortgagee was entitled to recover from the insurer the amount of the mortgage debt tendered to it, to wit, $1,531.32; that upon the payment of that amount the insurer was entitled to be subrogated to the mortgage. On the issues between the insurer and Harris, no specific findings as to fraud or breach of warranties were made, but it was found that the action of Harris should be dismissed. Decree was entered accordingly. Motions for new trial were filed by Harris and the mortgagee, which were overruled, and they have appealed.

Harris assigns as ground of reversal that the court erred in transferring the case as between him and the insurer from the law docket to the equity docket, and in denying him a jury trial of the issues therein involved.

The mortgagee filed a cross-appeal, assigning as error that the district court erred in refusing to allow it a reasonable sum as attorney's fees to be taxed as costs upon rendering judgment against the insurer upon the policy.

Two questions, therefore, are presented: First. Was Harris entitled as of right to a jury trial upon the question whether or not he procured the policy by fraud and misrepresentation? Second. Is the plaintiff entitled to an attorney's fee? Under former decisions of this court the demurrer of the mortgagee to the answer setting up fraud and misrepresentation on the part of Harris was properly sustained. *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743. This being so, it was entitled to a judgment upon the pleadings for the amount of the mortgage debt. Such a judgment, however, would not exhaust the amount due upon the policy, nor could it determine the right of the insurer to subrogation. Whether the right of subrogation existed depended upon whether or not the policy had been procured by fraud, because, if not so procured, the payment

of the debt from the proceeds of the policy canceled and discharged the mortgage as fully as if paid by Harris himself, and left nothing to which the insurer could be subrogated. The controversy between Harris and the insurer concerned the whole amount due upon the policy, which exceeded by more than $100 the amount due upon the mortgage debt. Nothing in the issues raised between the two companies could in anywise affect his right to this surplus, unless it was established that the policy was fraudulently procured. Since the evidence was not conclusive as to the fact of fraud, Harris was entitled to a jury trial of this issue, uncomplicated with any controversy between the insurer and mortgagee. The proper procedure would have been to try the issues between Harris and the insurer to a jury first of all. If the jury found on those issues that the policy was void, then the insurer would be entitled to the benefit of the mortgage by subrogation, having been compelled to pay it by its independent contract contained in the mortgage clause of the policy. On the other hand, if the jury found that the policy was valid, no right to subrogation existed, and Harris was entitled to a judgment for the difference between the face of the policy and the amount paid upon the mortgage debt. It was unnecessary for a court of equity to concern itself with the question of subrogation until the legal questions between Harris and the insurer had been determined by a jury adversely to him. *Shenehon v. Illinois Life Ins. Co.*, 100 Ill. App. 281; *Des Moines Life Ins. Co. v. Seifert*, 210 Ill. 157.

Upon the cross-appeal seeking for the allowance of attorney's fees, the contention of the insurer is that the evidence shows that, while the action was ostensibly brought in the name of the mortgagee, it was, in fact, brought for the benefit of Harris, and upon an agreement to hold the mortgagee harmless for any fees, costs or expenses incurred in the litigation, and therefore, having incurred no liability therefor, it is not entitled to recover attorney fees.

If the policy is held not to have been wrongfully procured, Harris is entitled to prove and recover a reasonable

fee for the services of his counsel in this action, measured by the whole amount payable thereon. If the policy is valid as to him, the recovery by the mortgagee is, in fact, one by him *pro tanto*, since it pays his debt. If it should be determined that Harris is not entitled to recover, then no attorney's fee should be allowed the mortgagee. Since it expended nothing for attorney's fees, it should receive nothing.

The judgment of the district court is therefore reversed, with directions to permit a jury trial of the issues between Harris and the National Union Fire Insurance Company as to fraud, misrepresentations, and breach of warranties in the procurement of the policy. If the jury find for the defendant upon that issue, subrogation should be allowed under the equity power of the court; but, if it is determined that the policy is valid, then the right of subrogation should be denied.

REVERSED.

HAMER, J., not sitting.

JAMES H. BERRYMAN ET AL., APPELLANTS, V. W. L. CHILDS, APPELLEE.

FILED JUNE 5, 1915. No. 18171.

1. **Appeal from Justice Court: PLEADING: STRIKING REPLY.** Since the only pleading required in the county court when exercising the jurisdiction of a justice of the peace is a bill of particulars, and the reply in the district court on appeal was to new matter in the answer and was not inconsistent with the petition, it should not have been stricken.

2. **Brokers: ACTION FOR COMMISSION: EXCLUSION OF EVIDENCE.** A printed and written contract between an owner of land and a broker or agent for the sale of land was signed by the owner by his own hand. The signature of the broker was printed. The broker acted upon the contract. In this, an action to recover a commission for the sale of the land described in the contract, the trial court excluded the paper as not being sufficient under section

2628, Rev. St. 1913, and refused an offer to show that the land was sold by virtue of the contract. *Held*, that the rulings were erroneous.

APPEAL from the district court for Rock county: R. R. DICKSON, JUDGE. *Reversed.*

J. H. Berryman, for appellants.

LETTON, J.

Action by real estate brokers to recover a commission upon a sale of land made for plaintiff. The trial court directed a verdict for the defendant. From a judgment based thereon the plaintiffs appeal.

In the spring of 1911 defendant employed the plaintiffs to procure a purchaser for 172 acres of land in Rock county, and at that time signed the following contract:

"I, *W. L. Childs,* of *Carnes,* county of *Rock,* state of Nebraska, have this day given Berryman & Janney the exclusive sale or transfer of the real estate as described hereon, which is owned by me, at the agreed price *53.00 per acre* dollars. I hereby appoint and constitute said Berryman & Janney as my lawful agent, and authorize said Berryman & Janney to enter into written contract for me, on my behalf and in my name, for the sale of said real estate. I agree to make a good satisfactory deed and to give a clear abstract of title to said real estate, showing the title to be fully vested in me. In consideration of the services of Berryman & Janney in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said Berryman & Janney out of the first payment a commission of *1.00 one per acre* dollars, payable at the office of said Berryman & Janney. Any change in the price or terms agreed to by me shall work no forfeiture in the commission due said agent in sale or transfer of said property. I hereby reserve the right to terminate this agency at any time after 30 days by giving 30 days' notice in writing to said agent. Receipt of a duplicate of this agreement is hereby acknowledged. *W. L. Childs,* Owner.

"Said agency accepted on above conditions. Berryman & Janney."

A full description of the land was written on the back of the paper before signing. The paper is printed, but the words in italics are written.

In the answer the defendant admits that he listed the land described for sale with plaintiffs as his agents, and that the land was sold to one Parks as alleged. Other defenses were pleaded which are not relevant to the question presented in this court. Mr. Janney testified that Mr. Childs signed the contract after he had filled the blank spaces in the printed paper, and that the name "Berryman & Janney" appearing on the lower left hand corner of the exhibit was printed thereon by the order or instruction of the firm. The contract was offered in evidence. Defendant objected to its introduction for the reason that it was incompetent and shows upon its face that it was not signed by the broker or agent who is intended to be a party to said contract. The objection was sustained. Plaintiffs then attempted to prove that the land was sold by plaintiffs to Parks by virtue of this contract, and that no commission had been paid. This testimony was also excluded. A motion to direct a verdict for the defendant was then sustained, and a verdict and judgment rendered accordingly.

The district court struck out all of the reply except a general denial, on the ground that its allegations were not within the issues tried below. The pleadings in the county court are not in the record. Since a bill of particulars of plaintiff's claim is the only pleading required by statute in an action to recover less than $200, and since the matter stricken in the reply is not inconsistent with the petition and responds to new matter in the answer, we think it should not have been stricken.

It is argued that, since the contract was executed, a recovery can be had even though it was not in writing. The rule in this state is that a broker who has sold land for another cannot recover either on the contract or upon a *quantum meruit* for the value of his services unless he

holds a written contract which satisfies the statute. *Nelson v. Webster,* 83 Neb. 169; *Clark v. Davies,* 88 Neb. 67.

We have not been favored with a brief by the appellee, but it seems apparent that the district court was of the opinion that the contract was not executed in accordance with section 2628, Rev. St. 1913: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." Since the owner of the land signed the contract, the question presented is whether "the contract is * * * subscribed by * * * the broker or agent." We have held that the word "subscribed" in this section is not to be taken literally, but in its popular sense as being equivalent to the word "signed." *Myers v. Moore,* 78 Neb. 448. The name of the firm was printed under the order and direction of the plaintiffs. The courts construe such statutory requirements more or less strictly according to the nature of the instrument involved. In such documents as wills much more strictness is required than in instruments of less importance and effect.

In *Schneider v. Norris,* 2 M. & S. (Eng.) 286, an invoice was sent by the seller to the purchaser, headed: "London, October 24, 1812. Messrs. John Schneider & Co. bought of Thomas Norris & Co., agents, cotton yarn and piece goods. No. 3, Freeman's Court, Cornhill." A list of articles with the quantities and prices followed. The whole heading of the bill was printed, except the words "Messrs. John Schneider & Co." It was held that the printed name, under the facts, was sufficient to satisfy the statute of frauds and to bind Norris & Company, which was the intention when the bill was made out. *Saunderson v. Jackson,* 2 Bos. & Pul. (Eng.) 238, and *Drury v. Young,* 58 Md. 546, 42 Am. Rep. 343, are practically to the same effect. In *In re Walker,* 110 Cal. 387, 30 L. R. A. 460, and in *Cummings v. Landes,* 140 Ia. 80, the meaning of "signature" is

discussed, and it is shown that signatures were at first usually made by the mark or cross, and that writing is not absolutely essential if the party acts upon or intends to be bound by the mark, stamp or printed name. Where a name was stamped upon a notice of objection in an election contest proceeding which the statute required "shall be signed by the person objecting," this was held sufficient. *Bennett v. Brumfitt,* 3 L. R. C. P. (Eng.)* 28. In 29 Am. & Eng. Ency. Law (2d ed.) 856, it is said: "A printed name upon a paper which is delivered under circumstances showing an intention to regard the printed name as the person's own will suffice, as will an entry in a book containing the owner's name at the top of the page." Where a statute provided that the summons in a civil action should be "subscribed by the plaintiff, or his attorney," the law was held to be complied with if the signature was printed or stamped. *Barnard v. Heydrick,* 49 Barb (N. Y.) 62; *Mezchen v. More,* 54 Wis. 214; *Herrick v. Morrill,* 37 Minn. 250.

The plaintiffs having signed the contract with their printed name with intention to be bound by it, having assumed its obligations, and (assuming the fact to be according to their offer of proof) having discharged it according to its terms, are entitled to the benefit of it.

The validity of the contract was also attacked in the district court on account of the land being a homestead and the contract not being signed by Mrs. Childs. Of course, the contract neither affected Mrs. Childs' interest in the premises nor the title to the land; but this does not interfere with the right of plaintiffs to recover a commission from Mr. Childs if they produced a buyer to whom Mr. and Mrs. Childs sold the land.

For the reasons stated, the judgment of the district court is

REVERSED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

NICHOLAS A. SHUE, APPELLEE, V. SCHOOL DISTRICT, APPELLANT.

CHARLES M. SOKOL, APPELLEE, V. SCHOOL DISTRICT, APPELLANT.

FILED JUNE 5, 1915. Nos. 18208, 18209.

Intoxicating Liquors: RECOVERY OF LICENSE FEE. A liquor license was granted by municipal authorities and the license fee paid. An appeal was taken, which was sustained, and the license afterwards revoked. The village authorities had reasonable ground to believe that the applicant was competent and qualified at the time they granted the license. No reason for its cancelation arose after it was issued. *Held*, that the applicant may recover back a proportionate part of the license fee for the period, before its issuance, and after its revocation, during which he was not permitted to enjoy the privilege granted.

APPEAL from the district court for Merrick county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

Martin & Bockes, for appellant.

D. F. Davis and *Reeder & Lightner, contra.*

LETTON, J.

The plaintiffs, each for himself, made application to the village board of Silver Creek for a license to sell intoxicating liquors for the year beginning May 1, 1911. A remonstrance was filed to each application which was overruled by the village board, but before the license was issued an appeal was taken to the district court for Merrick county, where the action of the board was sustained. The remonstrators appealed the cases to this court, where the action of the district court was reversed and the village board directed to cancel the licenses, which was done upon the 4th of January, 1912.

These actions are brought to recover a portion of the license fee collected by the village of Silver Creek and paid to the defendant school district. It is admitted that the

licenses were canceled on account of facts stated in the opinions in the cases of *In re Shue,* 90 Neb. 288, and *In re Sokol,* 90 Neb. 290, and not on account of any action of the plaintiffs during the term of the license.

Defendant contends that plaintiffs, each having knowingly and intentionally misled the licensing authorities into granting a license, are not entitled to recover back any part of the money paid for license; and that it is only where a license has been canceled without fault by the licensee that such recovery is permitted.

Plaintiffs rely upon previous adjudication of this court holding such recovery is proper. That the question as to the previous culpability of the applicants was not free from doubt, witness the decision of the village board and also of the district court in their favor. We are not convinced that the *mala fides* of the plaintiffs is so clearly shown or conclusively established that they should be penalized by refusing them a right accorded to others. We think, therefore, the case in its main aspects falls within the established rule.

But defendants also urge that plaintiffs are not entitled to recover for the period the licenses were suspended during the appeal to the district court. In *City of Auburn v. Mayer,* 58 Neb. 161, it was held that, where a liquor license was issued, an appeal taken, the license suspended, the appeal decided in favor of the applicant, and the license reissued, the licensee was entitled to repayment of such proportion of the license fee as the time when his enjoyment of the license was suspended bore to the license year. The question presented here is somewhat different, since the plaintiffs were never entitled to license. We can see no distinction in principle, however, between allowing recovery of the proportion of the license money for the time following revocation, and the proportion for the time before the applicant was permitted to take advantage of it. Each plaintiff is therefore entitled to recover the amount allowed by the judgment of the district court.

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

LUCIUS LEAVITT ET AL., APPELLANTS, V. SIGEL MATSON ET AL., APPELLEES.

FILED JUNE 5, 1915. No. 18897.

1. **Schools and School Districts: SELECTION OF SCHOOLHOUSE SITE.** School boards should act fairly and impartially in the matter of allowing the electors of a school district an opportunity to express their desire as to the site for a proposed new schoolhouse.
2. ———: ———: **FRAUD: ISSUANCE OF BONDS: INJUNCTION.** Evidence *held* not to establish such fraud, discrimination or fraudulent representation as to the site upon which a proposed schoolhouse would be built as to render it the duty of a court to enjoin the issuance of bonds voted for the purpose of erecting and furnishing a school building.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

A. G. Wolfenbarger and *H. S. Lower,* for appellants.

Morning & Ledwith, contra.

LETTON, J.

The plaintiff is a resident taxpayer of school district No. 139, Lancaster county, and the defendants are the members of the school board of the district. The purpose of the action is to enjoin the board from issuing $20,000 in bonds of the school district voted for the purpose of building and equipping a schoolhouse, and to declare that the election called for the purpose of submitting to the voters the question of issuing such bonds and an election called for the purpose of moving the site of the schoolhouse, both held upon the 18th day of June, 1914, be declared to be void and of no effect. The main reasons alleged are defects in the notices; that a number of the voters were not qualified; that the signatures of a sufficient number of the signers to the petition for the election to vote bonds and of votes to carry the bonds were obtained by false statements and fraudulent misrepresentations; and that the

"Hillcrest" petition was collusively prevented from being submitted to a vote.

The facts seem to be that in February, 1914, a petition was filed asking that an election be called upon the question of issuing bonds in the sum of $25,000 for the purchase of certain lots in Hillcrest addition to Bethany and to build and equip a schoolhouse thereon. The board refused to call this election, when one Britt began a mandamus proceeding to compel such action. The district court granted the writ with certain modifications. Britt appealed to this court, where the judgment of the district court was reversed and the action dismissed. Pending the appeal, a petition was circulated and filed with the board asking that an election be called to change the schoolhouse site to the "Hillcrest" site, and another petition asking the board to call an election to submit a proposition to vote $20,000 in bonds to erect and furnish a schoolhouse. A great difference of opinion and lack of harmony developed among the voters with regard to the proposed change of site, residents of the northern portion of the village desiring one site, and those living in the southern part another. At the request of a number of citizens the school board informally appointed six persons as "a mediation committee." This committee finally recommended and petitioned the board to call an election to change the schoolhouse site to certain lots in block 42 of the original plat of Bethany Heights, known as the "Swiger block." The board then laid the "Hillcrest" petition upon the table, and at the same meeting called an election to vote upon the "Swiger block" site, at the same time and place as the bond election, to wit, June 18, 1914. At the appointed time the school meeting took place and the elections were held. The proposition to vote bonds was carried, and that to change the site of the schoolhouse was defeated.

It is these elections that the plaintiff desires to have declared null and void. The principal contentions now made seem to be that the board acted fraudulently in tabling the petition to call an election submitting the "Hillcrest" site to a vote and substituting the petition by the

"mediation committee" for a vote upon the "Swiger block" site, and in representing, by themselves and their associates, to the voters that if the bonds carried the money would be used to build a schoolhouse on the "Swiger block." As matters now stand, bonds have been voted, but no new site selected. Plaintiff fears that the new building will be erected on the old site. The petition to call an election on the "Hillcrest" site is still upon the table.

Many witnesses for the plaintiff show by their testimony that it was their understanding that if the bonds were voted the schoolhouse would not remain upon the old site, but would be built upon the "Swiger block;" but it is equally clear that many of the voters understood that both questions were to be voted upon at the same time. Indeed, some of these witnesses voted for the new site and against the bonds, some for the bonds and against the site, and some for both propositions. Those who desired the change probably had sufficient confidence to believe that both proposals would carry; but it is a common experience that confidence as to the result of an election is often misplaced—the site might be selected and the bonds defeated, or the proposition to issue bonds carry and the change of site be defeated. We have been unable to discover any fraudulent acts or representations which would justify a reversal of the judgment of the district court.

Contentions between voters living in various portions of school districts as to schoolhouse sites are not uncommon. School boards should in such matters act fairly and impartially, giving ample opportunity for the voters to indicate their preference. The inference is drawn—as to a few witnesses perhaps properly—that because the petition for the "Hillcrest" site was circulated at the same time as the bond petition, and partly at least by the same persons, the petitioners and voters were deceived. The very appearance of evil should be avoided. We have so far not been convinced that the board is desirous of thwarting the will of the majority. As suggested by the district court, the question as to where the schoolhouse shall be located is still an open one. The chairman of the board testified that

if a vote was desired on the "Hillcrest" proposition it could be had. It is within the power of the school board to take from the table the petition to call an election upon the "Hillcrest" proposition and to submit the matter to the voters within the next 40 days.

The judgment of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

TAVNER R. NEAL ET AL., APPELLEES, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18152.

1. **Appeal:** CONFLICTING EVIDENCE. A finding of the jury upon conflicting testimony will not be set aside, if there is competent evidence to support it, unless clearly wrong.
2. ———: EXCLUSION OF EVIDENCE. Rulings of the trial court excluding proof of collateral facts as too remote in point of time will not be disturbed on appeal, where the record does not show an abuse of discretion.
3. **Evidence:** EXPERT EVIDENCE: ULTIMATE FACTS. An objection to a question calling for the opinion of an expert witness on the ultimate fact to be determined by the jury should be sustained.
4. ———: VALUE OF PERSONALTY. In an action to recover damages for the loss of personal property destroyed by fire, the owner may testify to its value.
5. **Appeal:** AMENDMENT TO PETITION. During the trial, permission to amend the petition by praying for damages in excess of the sum originally claimed *held* not reversible error.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

J. A. C. Kennedy and *Will H. Thompson,* for appellant.

H. S. Daniel and *John A. Moore, contra.*

ROSE, J.

This is an action to recover $3,000 for damages resulting from fire in a one-story frame shingle-roof warehouse at Forty-first and Nicholas streets in Omaha. The building and contents were owned by Tavner R. Neal, one of the plaintiffs. The other plaintiffs had insured the property against fire, and they have paid insured the amount due under his policies. The warehouse was located about 50 feet from defendant's railroad track, and plaintiffs plead that the fire was negligently started by a passing locomotive. Defendant denies negligence and the starting of the fire. The trial resulted in a verdict in favor of plaintiffs for $2,500 and interest. From a judgment for $2,991.15, defendant appeals.

The principal assignment of error is that the verdict is not sustained by the evidence. The theory of plaintiffs is that the fire was started by sparks from a locomotive which passed the warehouse on defendant's track about 9:35 P. M., January 29, 1910. In the building there was a plastered living apartment consisting of a kitchen, a dining-room and two bedrooms. There was a range in the kitchen and a heating stove in the dining-room. Defendant's theory is that the fire originated from a stove. There is proof tending to show that the fire made its greatest headway in the living apartment, where firemen first directed their efforts; that the wind blew at the rate of eight or nine miles an hour from the warehouse toward the railway track; and that there was snow on the ground. From testimony of this nature, it is argued by defendant that sparks from the passing locomotive did not start the fire, and that the trial court and the jury disregarded physical conditions and the operation of natural laws. A finding in harmony with defendant's view of the evidence, however, was not the only alternative. On behalf of plaintiffs there is competent evidence tending to prove the following facts and conclusions: The passing locomotive was at the time pulling a load up grade and was emitting sparks in great volume. It threw glowing cinders against the wind farther than the distance between the railroad track and the

roof of the warehouse. The roof was steep, and there was no snow on it. On the slope next to the railway track, smoke was discovered a few minutes after the train passed, and later fire was seen. The wall next to the passing train was burnt more than the opposite wall. The occupant of the living rooms testified that there was no fire in the heating stove; that at 6 o'clock in the evening he made a fire in the range, using kindling, but no coal; that he left about 7, and that there was then very little fire in the range. Evidence of this character is believable, and, when considered with the entire record, it is sufficient to support the verdict.

A number of assignments of error are directed to rulings which prevented defendant from showing the weather conditions and the daily snowfall on various dates before January 28, 1910. The fire occurred in the evening of January 29, 1910, and at that time, according to the undisputed evidence, there was no snow on the roof of the warehouse. Defendant, nevertheless, was permitted to show the amount of snow on the ground January 28, 1910, and the next evening. Proof of the snowfall January 29, 1910, was also admitted. In addition, defendant offered to show the snowfall as early as November, 1909. In ruling on offered proofs of such collateral facts, it was the duty of the trial court, in the exercise of judicial discretion, to fix a reasonable limit to the period of inquiry. In this respect prejudicial error is not shown.

Complaint is made because some of the firemen were not permitted to express an opinion stating where the fire started. On the record made, the determination of that fact settled the case. The issue did not call for the opinion of an expert. After the evidential facts were stated, the jurors were as competent as the firemen to draw a conclusion. Under the circumstances of this case, the opinion of experts on the ultimate fact to be determined by the jury was properly excluded. *Read v. Valley Land & Cattle Co.*, 66 Neb. 423; *Chicago, R. I. & P. R. Co. v. Holmes*, 68 Neb. 826; *Benson v. Peters*, 87 Neb. 263.

Another assignment of error challenges a ruling which permitted plaintiff Neal to state the value of stock food and salt damaged by the fire. He was the owner of the property, and as such was qualified to testify to its value. *Hawkins v. Collins,* 89 Neb. 140; *Hespen v. Union P. R. Co.,* 82 Neb. 495.

It is further argued that the trial court erred in permitting plaintiffs, during the trial, to amend their petition by praying for judgment in the sum of $3,000 instead of $2,500, the amount of damages originally claimed. The point is without merit. Prejudicial error in the record is not affirmatively shown.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

IN RE ESTATE OF GUSTAV A. WIESE.
CITY TRUST & SAFE DEPOSIT COMPANY ET AL., APPELLEES, V. ALICE WIESE, APPELLANT.

FILED JUNE 5, 1915. No. 18156.

1. **Wills: ATTESTATION: "COMPETENT WITNESS."** The term "competent witness," as used in the statute relating to the execution of wills, means a person who, at the time of making the attestation, could legally testify in court to the facts which he attests by subscribing his name to the will. Rev. St. 1913, sec. 1290.
2. ———: ———: ———. A devisee may be a competent subscribing witness to a will.
3. ———: **PROBATE.** In a proceeding to probate a will, the question to be decided is whether the instrument offered is the will of the decedent.
4. ———: **SUBSCRIBING WITNESSES: COMPETENCY.** A trust estate created by a will is not invalidated because the trustee is one of the two subscribing witnesses. Rev. St. 1913, sec. 1293.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

William Baird & Sons, for appellant.

John C. Cowin and *T. F. Wiles, contra.*

ROSE, J.

This is an appeal from the affirmance of an order probating the will of Gustav A. Wiese who died in Omaha, November 29, 1912. Testator bequeathed his wearing apparel to his brother, and devised the residue of his estate to the City Trust & Safe Deposit Company of Omaha, trustee. After making specific provisions for the benefit of his two sisters, he directed the trustee to invest the remainder of the trust estate in mortgages or bonds, and to divide the net income between his widow and his daughter until 1925, when they are to share equally the remainder of the trust estate if the widow survives and has not remarried. The daughter objected to the probating of that part of the will relating to the trust estate on the ground that John F. Flack, one of the two subscribing witnesses, was president of, and a stockholder in, the corporation named as trustee. The objection was overruled and the will was probated. Upon appeal to the district court the order of the probate court was affirmed. From the affirmance, contestant has appealed to this court.

The attestation of a will by two competent witnesses is a statutory requirement. Rev. St. 1913, sec. 1290. A "competent witness" is one "who, at the time of attesting a will, would be legally competent to testify in a court of justice to the facts which he attests by subscribing his name to the will." *O'Brien v. Bonfield,* 213 Ill. 428; note to *Bruce v. Schuler* (108 Va. 670) in 35 L. R. A. n. s. 688.

Contestant insists that Flack was not a "competent witness" to the will, within the meaning of the following provision of the code:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Rev. St. 1913, sec. 7894.

This section was construed in *McCoy v. Conrad,* 64 Neb. 150, as follows: "In a contested proceeding for the probate of a will, the heirs at law of the alleged testator are not disqualified by the statute as witnesses to transactions and conversations with the deceased."

In that case statutes of several other states were discussed, and the Nebraska statute was distinguished. The decision follows *Brown v. Bell,* 58 Mich. 58. In the Michigan case the chief beneficiary was permitted to testify in support of the will. The conclusion of the court is that in a will contest there is no "representative of a deceased person." In *Lautenshlager v. Lautenshlager,* 80 Mich. 285, the *Brown* case is followed; the court remarking that the question would admit of argument, if an open one. In the Michigan cases a legatee was permitted, in a contest with the heirs, to testify to transactions with the deceased person. According to those precedents, Flack was a competent subscribing witness.

In a probate proceeding, the question to be decided is whether the instrument offered is the will of the decedent. Note to *Conoway v. Fulmer* (172 Ala. 283) in 34 L. R. A. n. s. 963.

Contestant also insists that the trust which testator attempted to create is void as being prohibited by the statute providing: "All beneficial devises, legacies, and gifts whatsoever, made or given in any will, to a subscribing witness thereto, shall be wholly void, unless there be two other competent subscribing witnesses to the same." Rev. St. 1913, sec. 1293.

It is insisted that, because the trustee's president was one of the two subscribing witnesses, the devise is "wholly void," since the trustee will receive compensation for its services. The proponent contends that the trustee will receive no gift under the will, and that its only benefit will be compensation for services. It has been held, though authority is divided, that the fees which would accrue to an executor, who was also an attesting witness, are not within the prohibition quoted. *In re Williams' Estate,* 50 Mont.

142; *Jones v. Grieser,* 238 Ill. 183, 15 Am. & Eng. Ann. Cas. 787. English courts, however, under a similar statute, have said that an executor, who is also a subscribing witness to a will, cannot receive a legacy providing compensation for services. *In re Barber,* 31 L. R. Ch. Div. (Eng.) 665; *In re Pooley,* 40 L. R. Ch. Div. (Eng.) 1. While this question was argued by the parties, it is not necessary to a decision, and will not now be determined.

The purpose of the legislation is to prevent fraud in the execution of wills by depriving a subscribing witness, unless there are two other competent witnesses, of all benefit under the will. The instrument itself and the trust created by it are valid. The policy of the law is to carry out the expressed intention of the testator. The beneficiaries of the trust should not be deprived of their rights by the acts of the trustee. It is a fundamental rule that equity will not allow a trust to fail for want of a trustee; and if it were held that the devise, so far as the interest of the trustee is concerned, were void, a court of equity would appoint a competent trustee to carry out the trust. It follows that the will was properly admitted to probate.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

R. C. ROPER, APPELLANT, V. A. L. MILBOURN, APPELLEE.

FILED JUNE 5, 1915. No. 19018.

1. **Vendor and Purchaser: BREACH OF CONTRACT: DAMAGES.** "In an action for a breach of contract for the sale of real estate, a vendor may recover of the vendee the damages fairly within the contemplation of the parties at the time they made their contract." *Roper v. Milbourn,* 93 Neb. 809.
2. **Damages: LOSS OF PROFITS.** "Profits which are in the contemplation of the parties and certain of ascertainment may be recovered." *Roper v. Milbourn,* 93 Neb. 809.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Reversed.*

W. D. Oldham, George C. Gillan and *R. C. Roper,* for appellant.

H. M. Sinclair, W. A. Stewart and *Brown, Baxter & Van Dusen, contra.*

ROSE, J.

This is an action to recover $9,755 and interest for breach of a written agreement by defendant to purchase from plaintiff 970.73 acres of land in Deuel county at $30 an acre. In answering the petition defendant admits the making of the contract, and alleges failure of performance on the part of plaintiff. Otherwise the answer is a general denial. From judgment on a verdict in favor of plaintiff for $1,067.55, he has appealed, insisting that the evidence demands a recovery of $9,593.94.

This is the second appeal. The case was first submitted to the trial court upon a demurrer to the petition. A dismissal of the action followed, but the petition was sustained here and the cause was remanded for a trial on the merits. The facts on which the action is based are stated in the former opinion and will not be repeated in detail. *Roper v. Milbourn,* 93 Neb. 809.

August 31, 1909, plaintiff entered into an optional contract to purchase from John Naslund at $19 an acre a ranch containing 1,614.37 acres of land in Deuel county, on the following terms: Fifty dollars upon the signing of the option; $5,950 upon the furnishing of abstract of title; $9,000 March 1, 1910, upon delivery of deed; remainder in five equal annual payments beginning March 1, 1911. The Union Pacific railroad crosses the land diagonally from the southeast to the northwest, the tract south and west of the railroad containing 970.73 acres worth from $30 to $35 an acre, and the other containing 643.64 acres worth from $10 to $15 an acre.

While the option was in force, September 13, 1909, defendant entered into a written contract to purchase from plaintiff for $29,121.90, payable in instalments, the tract south and west of the railroad, being 970.73 acres at $30

an acre, plaintiff agreeing to convey title and to deliver possession to the purchaser March 1, 1910. At that time plaintiff, relying solely upon his resale, was able and willing to convey title, after having demanded performance on part of defendant, but the latter made default, and plaintiff forfeited his option with Naslund, after having paid $1,000 in addition to the initial payment of $50. The evidence is uncontradicted that plaintiff could have complied with the terms of his option and with his agreement to convey the title to defendant except for the latter's breach of contract. The verdict in favor of plaintiff necessarily included a finding that defendant, when he agreed to buy the land, contemplated with plaintiff the profits of the resale, knowing the price at which Naslund had sold the land. This finding is supported by the overwhelming weight of the evidence.

Plaintiff insists that he failed to acquire title to the land; that he forfeited his payments of $1,050; that he lost the profits on a resale; and that the value of the tract north and east of the railroad is shown by undisputed evidence to be $12 an acre. He therefore estimates his damages as follows: Value of the unsold tract of 643.64 acres at $12 an acre, $7,723.68, less $1,551.13, the latter item being the difference between the price of 1,614.37 acres purchased for $19 an acre and the price of the tract of 970.73 acres resold for $30 an acre, $6,172.55; forfeited payments of $1,050; interest on both items from March 1, 1910, $2,371.39; total $9,593.94. On the contrary, defendant argues that plaintiff is bound by the verdict for $1,067.55, which includes only the forfeited payments and interest, because it is in harmony with an instruction to which there was no exception. The position of defendant is untenable, because the jury disregarded another instruction permitting a recovery for loss of profits. Defendant further argues that the verdict should not be set aside as inadequate, because the proofs show, as he asserts, that plaintiff was financially able to complete his purchase from Naslund, and thus prevent the damages for which he brought suit. This argument is based on certified checks

adduced by plaintiff to prove that he was prepared to pay the amount due Naslund. Plaintiff testified without contradiction, however, that he was only able to raise the funds represented by the checks on the faith and credit of his resale to defendant.

The verdict cannot be permitted to stand, but the amount of the loss of profits will not be determined on appeal, for the reason that the witnesses who testified to the value of the land north and east of the railroad varied in their estimates, which ranged from $10 to $15 an acre.

REVERSED AND REMANDED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

GEORGE EWH, APPELLEE, V. OTOE COUNTY, APPELLANT.

FILED JUNE 5, 1915. No. 18121.

Highways: ROADS ON COUNTY LINES: DAMAGES: LIABILITY OF COUNTIES. Where a public road is established and opened upon the line between two counties, part of such road having been established by each county, it is the duty of each to use reasonable diligence to keep such road in a reasonably safe condition for the use of the traveling public, and, for a failure to perform this duty, such counties are jointly and severally liable.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

W. F. Moran, for appellant.

Paul Jessen, contra.

FAWCETT, J.

The petition alleges that plaintiff, while lawfully driving along a public highway dividing the counties of Otoe and Nemaha, without fault on his part, ran into an open ditch or hole in the highway, and thereby sustained an injury to himself and damage to his buggy; that the injury was wholly due to the negligence of the defendants in al-

lowing the highway to remain for a number of weeks in an unsafe and dangerous condition and without danger signals or barriers to warn travelers of such condition. The action was commenced in the district court for Otoe county against both counties. Nemaha county filed a special appearance, objecting to the jurisdiction of the court, on the ground that at the time the summons was issued and served upon it the statute of limitations had run in its favor. The special appearance was sustained and the action as to Nemaha county dismissed. Thereupon, the county of Otoe moved to dismiss as to it, for the reason that there was a misjoinder of parties defendant; that the special appearance by Nemaha county had resulted in its dismissal; and that both counties were jointly liable, if at all, and not severally liable. This motion being overruled, a demurrer, based upon the same ground, was filed and overruled. The answer set out the same grounds, and alleged contributory negligence on the part of plaintiff. The reply is a general denial. There was a trial to a jury, and a verdict for plaintiff for $1,000, upon which judgment was entered, and defendant appeals.

But one point is argued in the brief, viz., that under section 2995, Rev. St. 1913, adjoining counties, traversed by a public highway jointly constructed and maintained by such counties, are only liable jointly, and not severally, for damages to one who is injured by reason of the negligence of such counties in failing to keep the highway in a reasonably safe condition for travel. The rule is otherwise. *Bethel v. Pawnee County,* 95 Neb. 203. That case is decisive of this.

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

MEYERS & COX, APPELLEE, V. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18130.

1. **Appeal:** WITNESSES: COMPETENCY: DISCRETION OF COURT. The determination of the competency of a witness to testify as to his opinion of the value of personal property, which is the subject of controversy, rests largely in the discretion of the trial court, and a ruling thereon will not be disturbed on appeal except when clearly erroneous as a matter of law.
2. **Evidence:** ADMISSIONS: CONCLUSIVENESS: MARKET VALUE. Where the reasonable market value of a herd of cattle is an issue in an action, and one member of a copartnership, which is a party to the action, testifies as to his best judgment as to the market value of the cattle, such testimony is not such a positive statement of the issuable fact as will constitute a conclusive admission thereof and preclude the consideration of other competent evidence.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Brogan & Raymond, for appellant.

Gurley, Woodrough & Fitch, contra.

FAWCETT, J.

In 1909 the plaintiffs, a copartnership doing business as Meyers & Cox, were engaged in buying cattle for feeding and fattening purposes in their yards at Mapleton, Utah. One L. J. Thomas was in their employ as a cattle buyer in and about American Falls, Idaho, at which place one L. L. Evans was offering for sale a large number of steers at $38 a head. This offer was known to Cox and Wagner, two of the members of the plaintiff firm. On November 5 Wagner presented to defendant, at Springville, Utah, for transmission to Thomas, at American Falls, this message: "Cox says not buy Evans cattle." Through some error in transmission the word "not" was omitted, so that when delivered to Thomas the message read: "Cox says buy Evans cattle." Acting upon this telegram as delivered

to him, Thomas bought for plaintiffs 418 head of the Evans cattle, paying therefor $15,789.65, approximately $38 a head. After the purchase was made the cattle were "cut out" of the Evans herd and trailed to Malad, Utah, where they were pastured for a few days and then shipped by rail to Mapleton. They were weighed for the first time at Salt Lake City, weighing in the aggregate 416,000 pounds. Plaintiffs instituted this action in the district court for Douglas county to recover the alleged difference between the purchase price and market value, and also the cost of shipment and extra feed and accommodations for the cattle, limiting their claim for recovery to $1,999. The trial court limited the inquiry to the difference between the market value and the purchase price. The jury returned a verdict in favor of plaintiffs for $2,205.70, upon which judgment was entered, and defendant appeals.

The errors assigned are: "(1) The trial court erred in admitting in evidence the opinion of the witness Parsons as to the value of the cattle in suit, without requiring a showing as to his actual knowledge of the Evans cattle, or confining his opinion to the kind or class of cattle to which the particular cattle in question belonged. (2) It was not competent for the jury to disregard the testimony as to value of the plaintiff Wagner." It is urged by defendant that it is error to admit in evidence an opinion as to the value of specific property, without first requiring a showing of actual knowledge of the property in question. As an abstract proposition this contention is sound, but defendant is seeking to make too literal an application of the rule. In order to make the testimony of the witness Parsons competent, it was not necessary that plaintiffs show an actual knowledge by him of the particular 418 head of cattle involved. The evidence shows Mr. Parsons to have been a very extensive dealer in Utah and Idaho range cattle for many years. His dealings as such dealer ran from 2,000 to 40,000 head per annum. He testified that he was familiar with most of the stock cattle in Utah and southern Idaho; that he was as familiar with the general run of cattle up there as he was with his own

herd; and with reference to the Evans herd he testified: "Q. Do you know what the fair and reasonable market value of about 400 head of Evans' steer cattle were worth per head at American Falls, Idaho, on November 5th, 1909? A. Yes, sir. Q. You may state what that fair and reasonable market value per head was. What was the fair and reasonable market price of these cattle at American Falls, Idaho, on November 5, 1909, as near as you can give it? A. I think that the outside price for the cattle would have been $33 per head." We have frequently held that the determination of the competency of witnesses to testify as to their opinion of the value of real estate or personal property, which is the subject of controversy, rests largely in the discretion of the trial court, and that a ruling thereon will not be disturbed on review except when clearly erroneous as a matter of law. In the light of this well-settled rule, the trial court did not abuse its discretion in receiving the testimony complained of.

The second assignment is based upon testimony given by Mr. Wagner, a member of the plaintiff firm. He was interrogated as to the market value of cattle at Springville, and answered that he was familiar with the market in general; that the market value of cattle at American Falls "would be the same in proportion as it would in Salt Lake. Q. What would the difference be, if anything? A. The difference in freight. Q. So the market value of cattle, excluding the freight, would be the same at American Falls as it would be at Springville, Utah? A. Yes, sir; just the same. Q. What was the market value of cattle at that time? Just give us your best judgment as to what the market value of cattle was at that time, the price per 100 pounds. A. I should say 3½ cents a pound would be a good price for those cattle. Q. Does the market value of cattle vary from time to time? A. Not a great deal on feeders in the field as a rule. Q. You say you saw these cattle at the time they were weighed? A. Yes, sir. Q. Can you state what the market value of these particular cattle was? A. About 3½ cents per pound."

Assuming, as the parties did, that the cattle weighed an average of about 1,000 pounds a head, if the testimony of Mr. Wagner is to be held conclusive as an admission by the plaintiffs, then the verdict was excessive. Defendant contends that this is the rule, and that the rule should be applied to the testimony of Mr. Wagner, and a number of authorities are cited to sustain the contention. We are unable to concur in this view. The rule that, where a party to an action testifies positively to a fact which amounts to an admission of the contention on the other side, it should be given the same effect as an admission in a pleading, is not applicable to the situation in the case at bar. Here the question to be decided is: What damage has the plaintiff firm suffered by reason of the error on the part of the defendant in the transmission of its message? That damage, under the ruling of the district court, was to be determined from the difference in the actual market value of the cattle at the time they were purchased by the plaintiffs' agent and the amount which plaintiffs had to pay. There being no way by which that difference could be determined with certainty, it became necessary to resort to opinion evidence, and witnesses, possessing a general knowledge of range cattle in the locality where the transaction occurred, were called upon to give their opinion as to the market value of these cattle. The fact that one member of the firm testified that his "best judgment as to what the market value of cattle was at that time" was 3½ cents a pound, is not such a positive statement of an issuable fact as should be held to bind the copartnership, or even the witness himself. Having given his opinion as to the value, if the testimony of other competent witnesses, and notably the testimony of so experienced an operator in that country as the witness Parsons, shows that he is mistaken in his estimate, we do not think any court should hold that his mistaken opinion should be held to constitute a conclusive admission, binding not only the witness, but his copartners as well. An examination of the cases cited by defendant shows that the cases relied upon are not cases

of testimony of a party as to an opinion, but that they are cases in which the testimony as to a fact in issue was positive, and not a mere opinion of the witness. We must therefore hold against the defendant on its second assignment.

Our holding upon the two assignments urged leaves the question one of fact only, which was one purely for the jury. Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

LOUISE E. VON DORN, APPELLANT, V. ERNEST E. HUNTLEY, APPELLEE.

FILED JUNE 5, 1915. No. 18183.

1. **Pleading:** COUNTY COURTS. The rule as to pleadings in the county court, in an action for the recovery of money in an amount exceeding the jurisdiction of a justice of the peace, is the same as in the district court; and, where an answer to such action in the county court contains a general denial, it puts in issue the cause of action stated in the petition; and when the answer, in addition to the general denial, pleads facts which constitute an affirmative defense, such facts, in the absence of a reply, will be taken as true.

2. ———: FILING REPLY: DISCRETION OF COURT. Where an action is tried in the county court upon a petition and answer, and, after both sides have rested, is continued until another day for argument, the refusal of the court, when the parties appear for argument, to permit a reply to be then filed, will not be held to be an abuse of discretion, in the absence of a showing that the case was actually tried on the theory that a reply had been filed, or that the evidence was of such a character that the denial of the right would result in a miscarriage of justice.

3. ———: CONSTRUCTION ON APPEAL. An answer which pleads an affirmative defense, like a petition, which is not assailed by motion or demurrer in the court in which the action originated, should in all appellate courts be liberally construed.

4. **Appeal:** FILING REPLY: DISCRETION OF DISTRICT COURT. In an action pending in the district court on an appeal from the county court,

It is not error to refuse to permit the filing of a reply to an affirmative defense pleaded in the county court, and to which the record shows no reply had been filed in that court.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

J. E. Von Dorn, for appellant.

Weaver & Giller, contra.

FAWCETT, J.

This action was instituted in the county court for Douglas county to recover a balance of $209.25, claimed to be due on an account stated. The petition alleges that plaintiff purchased the claim from the "J. E. Von Dorn Commission Company, a concern engaged in the grain business;" that the original account stated was for $619.25 and represented a balance due the commission company; that defendant agreed with the commission company that the account as stated was correct and agreed to pay the same; that he made a number of subsequent payments thereon in pursuance of the agreement, thus reducing the account to the balance sued for. The answer in the county court admitted that during the year 1908 defendant had some transactions with the commission company; that he made some payments to the company; and denied every other allegation in the petition contained. As an affirmative defense he pleaded that during the year 1908, and prior thereto, the commission company "conducted a commission house and handled trades in futures, bought and sold grain on margins without contemplating in any way the delivery or receipt of any grain, all contrary to the statutes of the state of Nebraska in such cases made and provided. This defendant admits that he made some trades with the said J. E. Von Dorn Commission Company, and further in that behalf alleges that none of the trades mentioned in plaintiff's petition contemplated the delivery or receipt of any actual grain by either of the parties to the contract, and were gambling transactions, and so known

to be by both parties to said trades." The parties went to trial in the county court upon the petition and answer, without any reply. The case was tried November 30, 1910, both parties being represented in court. Oral testimony was taken and depositions read in evidence. At its conclusion, and after both sides had rested, the cause was continued to the next day for argument. When the parties appeared on the next day to argue the case, plaintiff asked leave to file a reply. The request was argued and submitted to the court, and after consideration was duly overruled. The case was then argued and submitted, and resulted in a judgment for the defendant on a finding that there was nothing due to plaintiff on its cause of action. Plaintiff appealed to the district court.

In the district court the same petition and answer were filed. Plaintiff then moved to strike what it termed the third paragraph of defendant's answer, which in reality is the second paragraph. The paragraph assailed is the one in which defendant pleaded the unlawful character of plaintiff's business. The motion to strike was overruled. Plaintiff now assails that ruling as error, and argues that it assumed to admit allegations in the petition which were not contained therein. If the answer were construed with strict technicality, the assault upon it might be held good, but no such assault was made upon it in the county court, where the action was instituted and first tried. Not having been made there, the allegations of the answer, in all appellate courts, should be liberally construed. So construed, the motion to strike was properly overruled.

Plaintiff thereupon asked leave to file a reply to the same portion of the answer which had been assailed by the motion to strike. This the court overruled, on the ground that to permit the reply, even in the form of a general denial, to be filed in that court would be to change the issues which were tried in the county court. Counsel argues that the same rule should be applied in an appeal from a county court as in appeals from justice courts. In this counsel is in error. In a justice court no pleadings are required except the bill of particulars; while in the

county court, in cases beyond the jurisdiction of a justice of the peace, as the one at bar, the rule as to pleadings is the same as in the district court. No reply having been filed in the county court, the defendant's affirmative defense stood admitted. In the district court, without a reply, the same condition would exist, and would entitle defendant to a judgment on the pleadings. With a reply filed, the defense pleaded by defendant would be put in issue, and would necessitate a trial upon that issue. The district court was right in refusing to permit the reply to be filed. On the pleadings as they then stood, the court entered judgment in favor of the defendant on the pleadings. This was proper.

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

STATE, EX REL. HELEN SCHAFER, APPELLEE, V. BENJAMIN TELLER, APPELLANT.

FILED JUNE 5, 1915. No. 18186.

Bastardy: EXCESSIVE JUDGMENT. In a bastardy proceeding against a young man, 19 years of age, who is without other resources than his wages of $13 a week, and his dinners, as usher in a store, a judgment for $3,205, payable in monthly instalments of $15 a month, is excessive.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed with directions.*

Harry B. Fleharty, for appellant.

A. H. Bigelow, contra.

FAWCETT, J.

This is an appeal by defendant from a judgment of the district court for Douglas county in a bastardy proceeding.

Five errors are assigned, but the fifth assignment only will be considered, as the first four are clearly without merit. The fifth assignment is that the judgment is excessive. Defendant was 19 years of age at the time of the trial, was earning $13 a week, and had no other resources. He held a position as usher in a dry goods store, spending part of his time in a cafe operated in connection with the store. In addition to his salary, he was furnished his dinners in the cafe. The judgment was for $3,205, payable in monthly instalments of $15 a month. Under this judgment the payments would continue until the child became 18 years of age. We think the judgment is excessive and should be substantially reduced.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judgment in favor of the prosecutrix for $1,800, payable at the rate of $100 a year, in quarterly or monthly instalments as the district court may deem most appropriate.

REVERSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

MARY DAVIE, ADMINISTRATRIX, APPELLANT, V. DOUGLAS COUNTY, APPELLEE.

FILED JUNE 5, 1915. No. 19053.

Counties: NEGLIGENCE OF EMPLOYEES: LIABILITY OF COUNTY. A county is an involuntary quasi-corporation, created by general laws to aid in the administration of the government, and is not liable for injury caused by the negligence of its employees engaged in the service of one of its public institutions.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Frank L. McCoy and *Weaver & Giller*, for appellant.

George A. Magney and *Charles Haffke, contra.*

FAWCETT, J.

The petition alleges that George Davie, while employed in an annex to the main building of the Douglas county poorhouse, situate on the poor farm, through the negligence of the employees of the county charged with the management of the poorhouse and farm in furnishing him an unsafe and defective ladder upon which to stand while attempting to repair a leak in a steam pipe, suffered an injury from which ten days later he died. From a judgment of the district court for Douglas county, sustaining a general demurrer to the petition of plaintiff as administratrix of the estate of said George Davie, and dismissing her action, this appeal is prosecuted.

The contention of plaintiff is that a county is liable to its servants, injured by its negligence while at work for it under its orders, the same as any other master, and it is argued that this is especially so "when such work is the exercise by the county of a voluntary, private or ministerial act, as repairs upon its property which it owns, maintains and operates as its private property and for its private advantage, and is not a compulsory or governmental act for the state." *Burke v. City of South Omaha,* 79 Neb. 793; *Updike v. City of Omaha,* 87 Neb. 228; *Henry v. City of Lincoln,* 93 Neb. 331, and other cases are cited and quoted from to support plaintiff's contention. An examination of those cases, all of which were actions against cities, will show that they have no application to the case at bar. The case of a county purchasing a poor farm and maintaining a home for the indigent poor thereon is an entirely different matter. In 11 Cyc. 498*d*, the general rule is stated thus: "The general rule of law that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured, does not apply to counties. Counties are usually held to be involuntary quasi-corporations, merely political or civil divisions of the state, created by general laws to aid in the administration of the government. The statutes prescribe all the duties which counties owe, and impose all the

liabilities to which they are subject." This rule is fully sustained in *Symonds v. Board of Supervisors,* 71 Ill. 355; *Hughes v. Monroe County,* 147 N. Y. 49; *Hollenbeck v. Winnebago County,* 95 Ill. 148; and *McAndrews v. Hamilton County,* 105 Tenn. 399, which holds: "A county is not liable for injury caused by the negligent discharge of duty by one of its employees engaged in the service of one of its public institutions—e. g., a house of correction and reformation for the young—although the statute that authorized did not make compulsory, but left optional with the county, the establishment and maintenance of such institution, and regardless of the fact that the institution may yield an income that supports it, or may yield more or less than that, or nothing at all"—and cites numerous authorities to sustain its holding. The rule meets with our entire approval. By section 5797, Rev. St. 1913, the duty is cast upon every county to provide for its poor. The method which it will adopt in making such provision is optional with the county. Where the cases are not numerous they can be taken care of by the overseers of poor. In more populous counties, and particularly in counties within which are located large cities, where the poor are more numerous, it is the opinion of the writer that ordinary business prudence would dictate the purchase of a poor farm and the housing of all of its members in suitable buildings erected upon the farm, and the utilizing by the county of such services as the inmates may be able to render in the poorhouse and upon its farm, thus minimizing, as far as possible, the expense of the county. The fact that a county may adopt this method of caring for its poor does not constitute such method a private enterprise within the meaning of the rule announced in *Henry v. City of Lincoln, supra,* and other cases.

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

THOMAS B. MURRAY, ADMINISTRATOR, APPELLEE, V. OMAHA TRANSFER COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 17421.

Personal Injuries: REVIVOR: MEASURE OF DAMAGES. Former opinion (95 Neb. 175) adhered to.

Rehearing of case reported in 95 Neb. 175. *Former judgment of affirmance adhered to.*

SEDGWICK, J.

After our former decision in this case (95 Neb. 175), argument was allowed on the measure of damages. Upon this question we have had the assistance, not only of the attorneys engaged in the case, but also of other able attorneys interested in similar cases pending in this and other courts. For this reason, and because of the importance of the question, and the inconsistent, or at least incomplete, provisions of the statute, we have thought it best to state further reasons for our conclusion. The facts are sufficiently stated in our former opinion.

When one is injured in his person by the wrongful act of another, and begins an action to recover damages so sustained, and afterwards dies while his action is pending, what are the elements of damage which can be recovered? Our former opinion holds that, when the "action is revived in the name of an administrator, the latter takes the decedent's place in the litigation, and is entitled to recover for the benefit of the estate what the injured person would have been entitled to recover had he survived his injuries." The opinion cites *Webster v. City of Hastings,* 59 Neb. 563, and other decisions of this court, which could not have been determined as they were unless this is the law. Sections 8022, 8023, Rev. St. 1913, are: "In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwith-

standing the death of the person entitled or liable to the same." "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office; which shall abate by the death of the defendant." These are sections 463 and 464 of the Code as now numbered, and were enacted in 1858. Rev. St. 1866, p. 469. The latter section quoted provides that such an action as this shall not abate by the death of the plaintiff. This language is so direct and clear that it must be conceded that the administrator may continue the action. There seems to be no good reason in the nature of the case to forbid an administrator to begin and prosecute an action and at the same time allow him to continue an action for the same cause begun by the deceased in his lifetime. It is the duty of the court to construe these statutes together. If the deceased had lived to complete his action, he would have recovered for all damage done him by defendant's wrongful act, including the injury to his earning power during his expectancy of life. What he recovered would, of course, be directly for his own benefit, but it would become a part of his estate, and upon his death, occurring after the receipt of such remuneration, it would benefit his next of kin and all others who would be interested in his estate. His wife and children are interested in his estate while he lives, and his creditors are interested in so much thereof as is necessary to satisfy their claims. The rights of wife and children in a specified and limited amount of his estate are superior to the rights of creditors. The husband and father cannot ignore the rights of his family nor of his creditors in his property. His relation in them is analogous to that of trustee. It would seem, therefore, that, if in his lifetime he recovered full compensation for his injuries, the liability of the wrongdoers would be extinguished.

The supreme court of South Dakota has, in a recent case, considered that there is a double liability; that their death act, which is essentially the same as ours, creates a

new cause of action. This conclusion is earnestly contested by two of the judges in dissenting opinions. *Rowe v. Richards,* 151 N. W. (S. Dak.) 1001. We refer to this as one of the very recent cases, in which many authorities are collected and freely quoted. The majority opinion is largely devoted to a discussion of the difference between a "cause of action" and "a right of action," and particularly between the "cause of the injury" and "the injury itself." The opinion considers that the failure to observe this distinction has led to the view "that there could be but one recovery for one wrong—'one wrongful act.'" There would be much force in this suggestion if the cause of action were the wrongful act. As suggested in the opinion, if "A, in negligent disregard of the rights of others, fires a bullet from his rifle," if the shot does no damage, there is no cause of action, but if it injures B and C, then each have a cause of action against A. B's cause of action is not the wrongful act, but the injury it has done him. But under our death act the cause of action is not the wrongful act, but damage that act has caused. It has injured the earning capacity of the deceased. It is not for the death of the deceased that the widow sues. It is for her loss caused by the injury to her husband. That the injury caused the total destruction of his earning capacity and all benefits which she otherwise would have received from her husband is rendered certain by his death as the result of that injury. If one maliciously sets fire to a building in which the property of A and B is stored, their loss is the destruction of their property, and not the "wrongful act." If each owns a separate and distinct part of the property destroyed, each has a distinct cause of action. If the title to the property is in a trustee for their benefit, the trustee may recover the whole loss in one action, and payment of the full value of the property to the trustee would ordinarily satisfy the claims of both A and B. Under our statutes the wife has an interest in the property and rights of her husband at his decease, of which he cannot deprive her by any act of his. His creditors also have an interest which he cannot ignore. His admin-

istrator represents all of those interests. Therefore, there seems to be no reason why the whole matter could not be disposed of in one action. If the petition, in addition to the other allegations of damages, alleged the earning power of the deceased, and who were the dependents, and what each of them was entitled to recover under Lord Campbell's Act, which is called by some courts the "death act," and how much the estate of the deceased ought to recover, and if the verdict of the jury or findings of the court were equally specific, there would be no difficulty in administering the two sections of the statute together. We have alluded to the question actually decided in the South Dakota case, because, as the decision in that case shows, the question of the power of the party injured to collect full compensation, and so bar any future action, is so connected with the question in the case at bar that neither can be satisfactorily determined without reference to the other. The suggestion of a "double recovery" has injected itself into very many decisions. Of course, if a settlement with the party injured is affected with fraud or overreaching, it might be avoided, and, if the amount received was grossly inadequate to the injury suffered, that of itself would be evidence tending to show unfair practice.

By the ancient common law there could be no private action for the felonious killing of a human being. Such damages inhered in the felony and belonged to the crown. The courts in those times appear to have extended the principle so as to forbid an action for death caused by any wrongful act, whether felonious or otherwise. If the legislature had abolished this rule, and expressly provided for an action for damages caused by an unlawful act, whether death resulted or not, the difficulties of the situation would be removed. Judge Cooley says it is remarkable that the legislatures have not done so. "Why should not the money value of his life, when it has been taken away by unlawful act or negligence, be a right of action in the hands of his representatives?" 1 Cooley, Torts (3d ed.) p. 31 (*27).

Such a statute could give a preference to the widow or widower and next of kin as our statute does, and, when

the entire damage sustained by all parties was recovered by the administrator, the proceeds in the hands of the administrator could be reported to the probate court as other assets to be distributed as the law required, or, perhaps still better, the statute might provide for the determination of the rights of the respective parties upon the trial in the district court, as suggested above.

It has been suggested that if the administrator should prosecute such an action for the benefit of the estate and also for the benefit of the next of kin—that is, making the claim under the survival statute and the claim under the death act in one action—the administrator might be more zealous for the estate than for the widow and next of kin, and so the latter would be wronged. But no action can be brought under the death act for the widow and next of kin, except by the administrator; and, if there is danger of discrimination, the probate court can determine the rights of the respective parties in the recovery when the district court has failed to do so.

It would appear from the diversity of judicial decisions that there has been unfortunate and incomplete legislation in the other states as well as in our own. Construing these statutes in the light of history and of present conditions, we conclude that the intention of the legislature was that, when an action has been begun by the party injured to recover damages suffered because of the wrongful act of another, the action does not abate, nor any part thereof, by the death of plaintiff, and the administrator takes the place of the plaintiff therein and can recover any and all damages that the injured party could have recovered if he had survived, including injuries to or loss of his earning power.

We adhere to our former opinion.

AFFIRMED.

BARNES, J., dissenting.

I am unable to concur in either the original opinion by Judge Rose or the present opinion by Judge Sedgwick, affirming the judgment of the district court.

By the majority opinion the administrator of the estate of Miller is allowed to recover, not only for the pain and mental suffering actually sustained by his decedent, the physical injury suffered by him, the expense incurred for necessary medical and surgical attention in treating him for his injuries, but, in addition thereto, such sum as decedent would have earned for the whole term of his life expectancy, as shown by the Carlisle table, if he had not died as a result of his injuries. As to this last item of the recovery, I am convinced that the majority of the court is wrong.

By the act of February 25, 1873 (Gen. St. 1873, ch. 15) it was provided: "Section 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person, company or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or company, or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Section 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action, shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: *Provided,* that every such action shall be commenced within two years after the death of such person."

Prior to the passage of that act, there was no statutory right for any one to recover for death by wrongful act; and whatever right accrued to the administrator of the deceased person, or those dependent upon him for support, was that which existed at the common law. By the act above quoted, a new right of action was created, and the widow and next of kin of the deceased were allowed to recover a sum not exceeding $5,000 for the pecuniary injuries resulting to them by reason of death caused by wrongful act. That statute has remained unchanged to the present time, except by an amendment including the widower, and the repeal of so much thereof as limited the amount of the recovery to the sum of $5,000.

It appears that the statutes of this state have made no direct provision for a recovery by the administrator of the estate of one who is killed by wrongful act, of any amount whatever representing the earning capacity of a deceased person after his death, except such recovery as may be had for the benefit of the widow or widower and next of kin of his decedent. Plaintiff decedent, Miller, in the case at bar, left no widow or next of kin, and no one dependent in any manner upon him for support. Therefore, the plaintiff in this case could not recover anything representing the earning capacity of decedent after his death occurred. The right of recovery, so far as that matter was concerned, was extinguished at Miller's death. I am satisfied from a thorough investigation that no case can be found which holds that the loss of earning capacity can be recovered for the benefit of creditors of the decedent.

It is true that under the revivor statute the action commenced by Miller in his lifetime was properly revived, and it seems clear from the weight of authority that the administrator could recover for the benefit of the estate of his decedent for the pain and suffering, both mental and physical, and decedent's loss of wages during the time he survived his injuries, for the necessary hospital charges, and for the value of the medical treatment furnished him by his physician; but the statutes have not made any provision for a recovery for decedent's earning capacity, ex-

cepting such as provided for the benefit of the widow and next of kin, above mentioned.

In *Dwyer v. Chicago, St. P. & O. R. Co.,* 84 Ia. 479, 35 Am. St. Rep. 322, it was said: "The statutes deal with the 'cause of action,' and not with the rule of damage to be applied. In fixing the damage, we look to the wrong to be remedied, to the injury to be repaired."

In *Brown v. Chicago & N. W. R. Co.,* 102 Wis. 137, the court said: "Such damages to the widow and next of kin begin where the damages of the intestate ended, viz., with his death." And on rehearing (p. 150): "'The death is the end of the period of recovery in one case and the beginning in the other. In one case the administrator sues as legal representative of the estate for what belonged to the deceased, in the other he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them.' * * * The damages in one right are limited to the loss which accrues to the injured person before death, and the damages in the other to the pecuniary loss of surviving relatives, as before the survival statute. The two rights in no way overlap each other." See *Johnson v. City of Eau Claire,* 149 Wis. 194.

In *Jacobs v. Glucose Sugar Refining Co.,* 140 Fed. 766, it was said: "And if this be so, then by what logic or reasoning can it be said that two actions cannot be brought against one wrongdoer, the one for pain and suffering, and the other for damages to the estate? Both are actions for compensatory damages. The one survives to the administrator under one statute, and the other is given to the administrator under another."

In *Quinn v. Johnson Forge Co.,* 9 Houst. (Del.) 338, the court instructed the jury as follows: "Should you decide in favor of the plaintiff, you should assess damages in such reasonable sum as you deem proper and right under the circumstances, and in fixing that amount you should consider such damages as have been actually proved by reason of loss of wages from the 20th day of July, 1891, up to March 3, 1892, when he died, and also allow such sum as you deem adequate and proper by reason of his

physical pain and mental sufferings. As regards the death of Peace as being the result of his injuries, you cannot take that into consideration in the estimation of damages. It has no connection with this case."

In *Belding v. Black Hills & Ft. P. R. Co.*, 3 S. Dak. 369, 375, we find the following: "In what manner, and under what circumstances could the deceased have recovered had death not ensued? He could have recovered, in addition to his physical and mental suffering, for loss of time and employment, the expenses of medical and surgical attendance, nursing, etc., incident to the injury. * * * Anything more? Certainly not." Pages 380, 381: "It does not provide, as we have seen, for the recovery of damages by the widow and heirs, and it is not provided that the personal representative shall institute the action for the use or benefit of such widow and heirs, or that the sum recovered shall be apportioned between the beneficiaries. The section (Lord Campbell's Act) seems to have been adopted with another object in view, and that was to give the widow, having in the death of a husband sustained the greater loss, the prior right to institute the action and recover the damages she has sustained by reason of the death of her husband. * * * To carry into effect the evident intention of the legislature, the widow should have the prior and exclusive right to institute the action and to the damages for the loss of the life of the husband. * * * If the action can be instituted by the personal representative, the damages recovered by him would be assets of the estate, and, in case the estate was insolvent, the money recovered would go to the creditors. This could not have been the intention of the legislature. * * * This seems but reasonable and just. All must concede, we think, that the wife, in the loss of her husband, on whom she is dependent for support, sustains a greater loss by such death than any other person."

The same rule is announced in *Atchison, T. & S. F. R. Co. v. Rowe*, 56 Kan. 411; *Pittsburgh, C., C. & St. L. R. Co. v. Hosea*, 152 Ind. 412; *Peake v. Baltimore & O. R. Co.*, 26 Fed. 495; *Louisville, N. A. & C. R. Co. v. Goody-*

koontz, 119 Ind. 111; *Hilliker v. Citizens Street R. Co.,* 152 Ind. 86; *Sturges v. Sturges,* 126 Ky. 80, 12 L. R. A. n. s. 1014; *Stewart v. United Electric Light & Power Co.,* 104 Md. 332, 8 L. R. A. n. s. 384; *Davis v. Railway Co.,* 53 Ark. 117, 7 L. R. A. 283; *Michigan C. R. Co. v. Vreeland,* 227 U. S. 59.

The case of *Mageau v. Great Northern R. Co.,* 103 Minn. 290, 15 L. R. A. n. s. 512, is to the same effect. The court said in that case: "The administrator recovers damages based upon the reasonable expectation of pecuniary benefit of the persons named by the statute, often not the husband, as the beneficiaries of the action."

In this state, however, the husband is included as one who may recover for the pecuniary injuries sustained by death by wrongful act. The authorities are almost numberless on this question. To summarize the whole matter, I have found by my investigation that the courts of fourteen of our sister states, the federal courts and the English cases support the rule announced in this dissenting opinion. The courts of five of the states refuse to allow any damages, stating that the action abates. The courts of last resort in eleven of the states permit a division of the damages, a part to the estate and a part to the widow and next of kin; while the courts of but four states support the rule stated in the majority opinion. I am therefore constrained to hold that the widow and next of kin are entitled to recover the damages allowed them by Lord Campbell's Act, in an action brought by an administrator of their own choice, without being compelled to resort to the probate or county court for a distribution. Their recovery should be for their benefit alone. The provisions of the statutes have been in force since 1873, and no difficulty has been encountered in enforcing them. They are plain, and are sufficiently explicit to cover all cases without resort to speculation or judicial legislation. It is my opinion that the judgment of the district court should be reversed and the cause remanded for further proceedings.

FAWCETT and HAMER, JJ., concur in the above dissent.

CARL HANNEMANN ET AL., APPELLEES, V. WILHELMINE OTT ET AL., APPELLANTS.

FILED JUNE 5, 1915. No. 18091.

1. **Specific Performance: PAROL AGREEMENT TO DEVISE.** A parol agreement to leave one's property to adopted children in consideration that they would, before and after becoming of age, assist in the work upon the farm of the promisor and in the family affairs generally, may be enforced if fully performed for many years in good faith by the adopted children.
2. ———: ———: **HOMESTEAD: STATUTE OF FRAUDS.** In such case the fact that the promisor, at the time of making such promise, was the owner of a homestead, which was the principal part of his property, will not render such promise unenforceable, as within the statute of frauds.
3. ———: ———. In such case the fact that the promisor had married the mother of his adopted children before such promise was made, and, after they had all lived together as one family for more than twenty years, had obtained a divorce from her and had been required to pay her a large amount as permanent alimony, will not prevent the enforcement of the contract with his adopted children after the death of the promisor.
4. **Evidence** found to be sufficient to prove the contract alleged.
5. **Witnesses: COMPETENCY.** While the widow of a deceased person is not a competent witness to conversations and transactions between herself and the deceased, she is competent to testify to transactions and agreements between the deceased and his adopted children, in which she took no part.
6. **Vendor and Purchaser: INNOCENT PURCHASERS: SUFFICIENCY OF EVIDENCE.** Defendants contend that, under contract with the deceased, they gave a valuable consideration for the property devised to them, and without notice of any claim of plaintiffs. But the evidence shows that defendants had knowledge of sufficient facts to put them upon inquiry as to the rights of plaintiffs, and cannot claim as innocent purchasers of property without notice.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Heasty & Barnes and *Charles A. Orth,* for appellants.

W. L. Kirkpatrick and *C. H. Dennecy, contra.*

SEDGWICK, J.

In 1879 the mother of these plaintiffs, then a widow with small children, came to this country from Germany and located in York county. A few months afterwards she was married to Wilhelm Hannemann, and later the children were adopted by Wilhelm Hannemann, and they all lived together as one family for several years. Mr. Hannemann died in Milwaukee, Wisconsin, in November, 1911. A short time before his death he made a will giving all of his property to collateral heirs in Milwaukee. These plaintiffs brought this action in the district court for Jefferson county, alleging that at the time of the marriage of their mother with Mr. Hannemann he agreed to adopt these plaintiffs as his children and to leave to them all the property that he might have at the time of his decease, and that, in pursuance of that agreement, he did adopt them; also alleging that at various times before, and at the time these plaintiffs became of age, the said deceased agreed with these plaintiffs that, if they would continue at their home with him, and assist in the work upon the farm which they then had, and assist in paying the liabilities against the farm, all the property that he had at his decease should be theirs, and that they relied upon that agreement and did assist, and asked for a specific performance of the agreement. The trial court found the issues in favor of the plaintiffs and decreed a specific performance. The defendants have appealed.

The briefs do not comply with our rule 12 (94 Neb. XI), and it is difficult to ascertain the questions of law relied upon for a reversal; but, as these briefs were filed a very short time after rule 12 was adopted, we have examined them, and, as nearly as we can ascertain, the defendants rely upon three propositions for reversal. They contend that at the time the alleged agreement with these plaintiffs was made the property of the deceased consisted of a homestead, and, as there was no written agreement to convey this homestead to the plaintiffs, an oral agreement

would be void within the statute of frauds. They also contend that there is not sufficient proof of the alleged agreements, or that these plaintiffs furnished to the deceased, a sufficient consideration for willing his property to them, and that they were at the time without any knowledge or notice of any former agreement, and therefore, as we understand their argument, are in the position of innocent purchasers without notice.

1. As to the first contention, it is perhaps sufficient to say that the alleged agreement of the deceased was not to convey the homestead or any specified part of it, but was a general agreement that, since he had adopted them as his children, if they would assist him in caring for the farm and paying the debts, they should have at his decease such property as belonged to him to bestow. It appears that in September, 1911, the deceased was divorced from the mother of the plaintiffs, and the court allowed her $5,000 permanent alimony. The defendants urge that this allowance was probably in view of the interest that the children had in the estate, and therefore should be considered to satisfy their claim; but, as already suggested, the alleged agreement was that the plaintiffs should have such property as the deceased had at the time of his death, and, even if their mother had been allowed an unreasonable alimony, it would not have affected their agreement with the deceased.

2. When we consider that the deceased adopted these plaintiffs, and in that adoption agreed to give them all the rights of his lawful children, we think that the evidence in this record is ample to prove the agreement on the part of the deceased that these plaintiffs should upon the condition named have such property as he might own at the time of his decease.

Mrs. Hannemann was probably incompetent to testify to transactions and conversations between herself and the deceased, and the trial court so regarded her, and declined to consider her evidence upon those matters. As to the agreement between these plaintiffs and the deceased, in which Mrs. Hannemann took no part, she was properly re-

garded as a competent witness. She testified that when Carl was about 19 years of age the deceased told Carl: "A. Well, he told him when he stays he should have all that was left to give," and, also, "he told them all together that, when they stay with him and paid all debts and mortgages and all off, they should have all what was left." She admitted that when Carl left home "he got just two old horses and one old wagon and a harrow and a plow is all what he got." The witness Charles E. Mulig, who was born in York county, and was 37 years old at the time of the trial, and had lived very near to the Hannemann place, testified: "Q. Did you ever hear the decedent, Mr. Hannemann, in his lifetime, explain why it was his children remained there and worked on the farm after they were of legal age? A. Yes, sir. Q. How many of these conversations might you have heard? A. Oh, quite a number; probably a dozen. Q. Where were these conversations? A. Well, I noticed the most while I was threshing, running a threshing machine. * * * Q. What did he say on some particular occasion, as nearly as you can recall it now? A. Well, in regard to the boys being at home and working, and he thought a good deal of the proceeds of the golden grain flowing, the good golden grain rolling out of the spouts of the threshing machine, and, of course, drawing attention, and I made the remark, of course, why it was that these boys stayed at home so good, so he said, 'We have a mutual agreement that when I am through with this property it shall become theirs to hold.' Q. Where was that conversation, as nearly as you can recollect; at the Hannemann farm at threshing? A. Yes. Q. When was that? A. That was about in 1900. I threshed for him several years; probably six or seven years, I owned a machine and run it. Q. Can you recall more than one conversation, and can you locate some one? A. Yes; in the yard in the evening after the day's work was over. Q. When was that? A. That was at the same season, some time we was threshing there. Q. Tell what that conversation was; who was it with? A. It was indirectly with the whole of them, several of them. Q. Were the

Hannemann boys there? A. They were. Q. Tell what it was. A. It was the same practically. He told us, 'We have a mutual agreement that when I was through with this property,' he said, 'it was all to become theirs.' Q. How many times have you and him referred to that understanding? A. Well, probably a dozen times, different times. Q. You are not a relative of any of the Hannemann children? A. Not at all." There were at least eight of the neighbors who gave similar testimony.

The plaintiffs were industrious, and interested in the family welfare, and conducted themselves as children in well-regulated families ordinarily do, until about the time of the divorce proceedings, when they appear to have sympathized more with their mother, which is not uncommon in families generally under such conditions. The deceased adopted these children as his own in July, 1889, and in his application for adoption stated that he did "bestow upon them all the rights of children and privileges and immunities of children born in lawful wedlock, and that all of said minors take the name of and be known by the surname of Hannemann." For many years afterwards he controlled these children, availed himself of their services upon his agreement, as above stated. They have performed their part of the agreement as well as he could have expected them to do.

Gustave E. Ott, one of these defendants, and a son of a second cousin of the deceased, who was named as executor of the Milwaukee will under which the defendants claim, in his application for probate of the will, testified that these plaintiffs, naming them, are "the heirs and next of kin of the said William Hannemann, deceased." The Milwaukee will contained the provision: "I give, devise and bequeath to my four adopted children, viz., Carl Hannemann, Fred Hannemann, Christian Hannemann and Johanna Hannemann, each one ($1.00) dollar. I do this intentionally, because they have received sufficient help and assistance from me, while I was living, and because they did not treat me right." The defendants therefore had sufficient notice to put them upon inquiry as to the

rights of these plaintiffs, even if they could under any circumstances claim as innocent purchasers under the will. The consideration which defendants rendered for this donation to them consisted in the care they rendered deceased, and expenses connected with his last illness and burial. Deceased arrived at the home of Gustave Ott in Milwaukee on the 19th of October, and died November 1. Mr. Ott filed an itemized claim for these services in the probate court of Jefferson county. It amounted to $162.40. The Milwaukee will was executed on the day the deceased arrived at Mr. Ott's home. Mr. Gustave Ott is a principal witness for defendants, and his affidavit verifying this claim is inconsistent with his evidence that this property, amounting to several thousand dollars, was given these defendants in consideration of the services rendered deceased.

The judgment of the district court appears to be amply supported by the evidence, and is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

DANIEL O'DONNELL, APPELLEE, V. RIDGLEY PROTECTIVE ASSOCIATION, APPELLANT.

FILED JUNE 5, 1915. No. 18101.

1. **Insurance: NOTICE OF ASSESSMENT: QUESTION FOR JURY.** Under the evidence in this case, the court properly submitted to the jury the question whether notice of assessment against his insurance certificate had in fact been properly mailed to the plaintiff.

2. **———: ASSESSMENTS: PAYMENT TO AGENT.** Payment of an assessment to the local agent of an insurance company, who has generally been entrusted by the company to make such collections, and who received the money for the company, must be regarded as payment to the company, in the absence of evidence that such assessment was not forwarded to the agent for collection.

3. **Appeal: INSTRUCTION.** The jury having found upon sufficient evidence that no notice of the assessment was mailed to defendant, as alleged, an instruction which in effect made the receipt of the notice, instead of the mailing thereof, the test of due service, if erroneous under the contract, was without prejudice to defendant.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Sackett & Brewster, for appellant.

S. D. Killen, contra.

SEDGWICK, J.

This action was brought in the county court of Gage county upon a certificate of accident insurance, and was afterwards appealed to the district court for that county. There was a verdict and judgment in favor of plaintiff, and the defendant has appealed.

There is no contention as to the character and amount of the insurance, nor as to the alleged accident and amount of recovery, if defendant is liable. The defense is that the plaintiff was in default of payment of an assessment, and had thereby forfeited his insurance when the accident occurred.

The defendant is a Massachusetts corporation, with its principal office at Worcester, in that state. It appears that about the 16th of March, 1908, an assessment had been made on the certificate holders, and on that day notices of assessment were sent by mail. The contract provided: "Any certificate holder failing to pay his assessments within thirty days of notice thereof shall forfeit all claims upon the association. * * * Notice of assessment sent to the last given postoffice address of the certificate holder shall be deemed a proper legal notification." The plaintiff testified that he had not received any notice of this assessment prior to the 4th day of May, 1908, and that on that day he paid to the agent of the association at Wymore the amount of the assessment. One of the questions was whether the notice of this assessment had been properly mailed to the plaintiff as the contract provided. The de-

fendant offered the evidence of Mr. Harrington, its general manager, and that of Miss Sawyer, its bookkeeper. When Mr. Harrington was asked whether or not the notice was mailed to Mr. O'Donnell on March 16, 1908, he answered, "It was to the best of my knowledge," and testified that Miss Sawyer "had immediate supervision of the mailing of such call," so that his testimony cannot be considered as proof that a notice was mailed to the plaintiff. Miss Sawyer testified that the call for the assessment was issued under her immediate supervision, and that such call was mailed from the home office March 16, 1908. She was then asked: "State whether or not such call so mailed to Daniel O'Donnell was mailed to him by you? A. Yes; it was." In her former answer she had stated as to when the call was generally mailed, and it will be noticed that she does not state directly that the notice was mailed to all of the policy holders on the same date, or that the notice was mailed to this plaintiff at the same time that it was mailed to other policy holders. There were other circumstances in the evidence tending to throw some doubt on the mailing of this notice, and the court properly submitted to the jury the question whether or not the notice was mailed prior to the 4th day of May, 1908, and the jury answered that it was not.

It is contended by the defendant that payment to the local agent at Wymore was not payment to the company, but there is evidence indicating that it was the practice of the company to forward statements of assessment to the local agent for collection, and it is not pointed out in the briefs that this was not done in this case, nor is it suggested that the agent failed to remit the assessment to the company or that the amount had ever been returned to the plaintiff. We think the jury was justified in finding that the agent was authorized to receive this payment.

The court instructed the jury: "If you find from the evidence that plaintiff, by himself or wife, paid the assessment of $3, which was due April 15, 1908, to F. E. Crawford in Wymore, Nebraska, within 30 days after having received a notice of such assessment, as provided in said

certificate of insurance, or if you find from the evidence that no such notice was ever sent to plaintiff by defendant, as provided in said certificate of insurance, then your verdict will be for plaintiff." This instruction is apparently technically inaccurate, in that it indicates that the notice to the plaintiff would not be sufficient unless actually received by him, which, if the provision of the contract is valid, would be inconsistent with such provision. But, the jury having found upon sufficient evidence that no notice was in fact mailed to the plaintiff, the error, if any, in the instruction quoted was without prejudice to the defendant.

The briefs are not in compliance with the rules, and we have not observed any prejudicial error requiring reversal.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

ARCHIE MALCOLM, APPELLANT, V. CITY OF LEXINGTON, APPELLEE.

FILED JUNE 5, 1915. No. 18146.

Officers: SPECIAL SERVICES: COMPENSATION: SUFFICIENCY OF EVIDENCE. The verdict of the jury is not so clearly unsupported by the evidence as to require a reversal.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Rhea & Hanlen, for appellant.

John H. Linderman, E. A. Cook and *T. M. Hewitt, contra.*

SEDGWICK, J.

This plaintiff was marshal, street commissioner, and a member of the board of health of the city of Lexington, in Dawson county. During a smallpox epidemic in that city, the plaintiff was employed as such officer to "look after the smallpox cases and the epidemic that was then pre-

vailing in the city, * * * to go from house to house from two to three times a day in the performance of those duties, and take charge of patients who refused to obey the quarantine laws, and put them in the pesthouse, and to give any special treatment in order to keep the disease from spreading, and to carry food and clothing night and day." He brought this action against the city, and in his petition in the district court for Dawson county he alleged that he was "required to use his horse and buggy both day and night to feed, look after, and stamp out the dreadful disease for a period of time from the 24th day of December, 1910, to April 18, 1911, in all 111 days, at the rate of $2 per day; that said charge is reasonable charge for such work for use of horse and buggy and extra work at night; and that no part of the same has been paid, save and except the sum of $60, which leaves a balance due and owing this plaintiff for said services in the sum of $162." There was a verdict and judgment in his favor for $1, from which he has appealed to this court.

He has not prepared his brief in compliance with the rules of this court, but the record is short, and we have observed that he contends that the uncontradicted evidence proves that he is entitled to a larger verdict. It seems to be conceded that he was paid his salary regularly as marshal and street commissioner, and the court instructed the jury that as *ex officio* member of the board of health his salary must be considered as full compensation for all services rendered by him. This instruction does not appear to be complained of, but he insists that he was not bound to furnish a horse and buggy, and that he should recover the reasonable value of that service. The court submitted to the jury the question whether "it was necessary for plaintiff to use a horse and buggy," and, if they found it was necessary, "then I charge you that he is entitled to recover such sum as you find from the evidence the use of such horse and buggy was reasonably worth, provided the same has not already been paid for." As the jury found in favor of plaintiff, they must have found that it was necessary to use a horse and buggy, and that it had

"already been paid for," except the $1 which they found in plaintiff's favor. If there is evidence justifying the finding that the use of the horse and buggy has been paid for by the city, the verdict is sustained. It appears from the stipulation of the parties that the plaintiff filed claims from time to time for his salary, and as he included in those claims only two items for "extra work taking care of smallpox cases," amounting to $60, the jury could not have allowed plaintiff more than $61 for the use of the horse and buggy. As they have found that such use was necessary, and in such case, under the instructions of the court, the plaintiff was entitled to the reasonable value of such services, the question is whether this evidence shows that the plaintiff necessarily used the horse and buggy more than the jury has allowed him for. The evidence of the plaintiff is not very definite as to the number of days which he necessarily used the horse and buggy. "Q. Did you furnish a horse and buggy in your employment in looking after the smallpox cases of this city in the month of December, up to and including April 18, 1911? A. I did." This is all of the evidence that we have observed in the record as to the use which the plaintiff made of his horse and buggy, and the jury may have construed this to mean that he was principally engaged in looking after smallpox cases for the time mentioned, and that during that time he made some occasional use of the horse and buggy. The plaintiff seems to contend that the $60 included in his claim allowed was for livery hire or some other matters of expense incurred by him. Such contention is not consistent with his pleadings. His petition purports to set out his extra services and expenses incurred on account of the epidemic, and does not acknowledge payment of anything thereon. He will be presumed to have alleged his entire claim, and any payment received thereon must reduce his recovery. We cannot say that the evidence is so clear and positive on this point as to require a reversal.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

I. F. KELLEY, APPELLEE, V. E. MEYER FRUIT COMPANY ET AL., APPELLANTS.

FILED JUNE 5, 1915. No. 18160.

1. **Trial: SUBMISSION OF SINGLE ISSUE.** If, upon trial before a jury, it appears upon all of the evidence that there is but one question of fact upon which there is any substantial conflict in the evidence, the court may submit such question of fact to the jury, and upon their verdict thereon should render such judgment as the law requires.
2. **Sales: ACTION FOR PRICE: COUNTERCLAIM: FINDING: JUDGMENT.** In an action to recover a balance of the purchase price of property with a counterclaim for money paid upon the contract on the ground that the property was worthless and that the contract was obtained by fraudulent representations, a finding upon substantially conflicting evidence that the property was as represented, will support a judgment disallowing the alleged counterclaim.
3. **Trial: SUFFICIENCY OF EVIDENCE.** Upon the evidence indicated in the opinion, the verdict of the jury is sufficiently supported, and the judgment thereon is not erroneous.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Weaver & Giller, for appellants.

De Bord, Fradenburg & Van Orsdel, contra.

SEDGWICK, J.

This plaintiff shipped two car-loads of potatoes from Minneapolis to Omaha for sale. Mr. Foy, a commission merchant of Omaha, acted for plaintiff; and sold the potatoes to defendant. The defendant paid $400 on the purchase, and afterwards refused further payment. The plaintiff brought this action in the district court for Douglas county to recover an alleged balance due. There was a verdict and judgment in favor of the plaintiff, and defendant has appealed.

The defendant admitted the purchase of the potatoes at an agreed price of 65 cents a bushel, amounting to $615.26,

but alleged that the potatoes were frozen, and that plaintiff's agent "falsely and fraudulently, and knowing that said potatoes were frozen, stated and represented to defendants that said potatoes were not frozen, but were good and marketable potatoes, with the exception of a very few near the car door; that a few near the car door were frozen, and for that reason not marketable, and said plaintiff, through his agent, said J. J. Foy, agreed to sell said potatoes to defendants at the reduced price of 65 cents per bushel, and defendants, relying upon said representations and statements, and believing same to be true, contracted and agreed to purchase said two car-loads of potatoes on said terms;" that the health department of the city of Omaha considered the potatoes as unfit for food, and that the plaintiff "thereupon further falsely and fraudulently claimed and represented to defendants that, notwithstanding the action of said health department, as above set forth, in condemning all of said two car-loads of potatoes, at least two-thirds of said potatoes which were in the center of said cars, being more or less protected, were not frozen, but were fit for food, and that he, the said Foy, would so represent to and arrange with said health department, and would obtain permission from said health department for defendants to sort out said two-thirds of said potatoes and to resell the same to defendants' customers. Defendants further aver that they again relied on said representations and promises of said plaintiff through his said agent, J. J. Foy, that two-thirds of said potatoes were not frozen, but were good and marketable, and that he would arrange with the health department for the sorting and resale of same, and that after said arrangements were made defendants thereupon paid said Foy the sum of $400, two-thirds of the agreed price for the same; that defendants thereupon, under permission of the health department, again took possession of said potatoes, employed help to sort the same, but found that a large part of said potatoes were frozen and were wholly unfit for food, and subsequently found that all were in that condition, and that the action of the health department in

so condemning said potatoes was right and proper, and that the claims and representations of the said plaintiff, through his agent, the said Foy, that said potatoes were not frozen, but were good and marketable and fit for food, were wholly false."

The defendant asked judgment against the plaintiff for the $400 paid and $60 "for the handling and sorting of said potatoes." The defendant testified in his own behalf that while the potatoes were in the cars he examined them with the plaintiff's agent and found that some of them were frozen; that they made an estimate of damage to the potatoes by freezing, and reduced the price to be paid for the two car-loads accordingly, and that he agreed to pay 65 cents a bushel for the lot; that this was less than the market price for sound potatoes, and was then supposed to be equal to the market price of that portion which was uninjured. He contended that a much larger proportion were frozen than as represented by plaintiff's agent, and that in fact they were all frozen, or so badly injured as to be worthless. The court assumed that the defendant did not have as good opportunity to know the condition of the potatoes as the plaintiff had, and that therefore he should only be required to pay for the good potatoes. This was as favorable to the defendant as he could demand under the circumstances. By the pleadings and the evidence, then, the only question of fact in dispute was what proportion of the potatoes were frozen or damaged. The court accordingly submitted but one question to the jury: "To what extent were the pototoes sold by the plaintiff to the defendant, in the two car-load lots, affected by freezing, or frost, at the time of the sale, so as to be unfit for food?" The jury answered: "Forty sacks unfit for food. Rest good." The sacks each contained two and one-half bushels, and 100 bushels were not more than the defendant concedes he knew were damaged when he agreed to pay 65 cents a bushel for the lot as billed. The plaintiff was therefore entitled to the contract price.

The defendant's allegation of a second agreement after the health commissioner had examined the potatoes is not

available, because the jury found upon substantially conflicting evidence that all of the potatoes were good except 100 bushels. This was, as defendant himself testified, the basis upon which he purchased the property. Defendant's counterclaim for the $400 depended upon his allegations that the potatoes were worthless, and of fraudulent representation as to the condition of the potatoes, and, as the jury have determined those issues in plaintiff's favor, the counterclaim must fail. All other questions submitted in defendant's brief depend upon the matters already discussed.

We find no error in the record requiring a reversal, and the judgment is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

LIVE STOCK NATIONAL BANK, APPELLANT, V. A. J. BRAGONIER, APPELLEE.

FILED JUNE 5, 1915. No. 18162.

1. **Appeal: BRIEFS: REVIEW.** A brief not in compliance with the rules will, upon motion, be stricken from the files, but when a case is submitted upon briefs without objection, if appellant has failed to assist the court with a brief in compliance with the rules, we will still reverse the judgment, if, upon such examination of the record as the time at our disposal will permit, a plain error prejudicial to appellant is found; otherwise, the judgment will be affirmed.
2. **Bills and Notes: RENEWAL: GUARANTY: CONSIDERATION.** The surrender of securities and extension of time of payment is sufficient consideration for a renewal note, and for guaranty thereof by a third party.
3. **Appeal: HARMLESS ERROR: SUBMISSION OF SPECIAL ISSUE.** The submission to the jury, for the information of the court, of a special question of fact, which under the instructions will not affect their general verdict, is not error requiring a reversal.
4. ———: **SUFFICIENCY OF EVIDENCE.** The evidence indicated in the opinion is found sufficient to support the verdict.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Lambert, Shotwell & Shotwell, for appellant.

A. H. Murdock, contra.

SEDGWICK, J.

In September, 1911, Gordon C. Dimock and his son, Gordon C. Dimock, Jr., were engaged in the lumber business in South Omaha, and were indebted to this plaintiff. A part of this indebtedness was their promissory note for $1,500, past due. They had organized a corporation in the name of the Dimock Lumber Company, and were then carrying on business in that name; but it appears that the indebtedness to the bank was contracted before the corporation was organized, and was the individual indebtedness of the Dimocks. They executed to the bank a renewal note for this $1,500, which was indorsed, "We, the undersigned, guarantee payment, waive demand, notice, and protest," which guaranty was signed by this defendant. The plaintiff brought this action in the district court for Douglas county against the defendant upon this guaranty. The defendant answered that there was no consideration for his guaranty, and that the same was procured by fraudulent representation. The trial resulted in a verdict and judgment in favor of the defendant, and the plaintiff has appealed.

While the defendant himself apparently received no consideration for his guaranty, the bank released at least some of its securities, surrendered the evidence of the prior indebtedness, and extended the time of payment. This, of course, would constitute sufficient consideration for the guaranty.

The defendant in the brief says that, "instead of separating his brief into a statement of the case, followed by an argument, counsel for appellant has so jumbled his pretended statement of the evidence with his brief that it is very difficult to distinguish argument from evidence or brief from statement." The plaintiff's brief is not in

accordance with the rules, but we might not perhaps characterize it in the language used by defendant. Our rule 12 (94 Neb. XI) we think is plain and easily complied with, if counsel have in mind some definite propositions of law that they desire to submit and upon which they suppose their case depends. Upon motion, a brief not in compliance with the rules will be stricken from the files, but when a case is submitted upon briefs without objection, if appellant has failed to assist the court with a brief in compliance with the rules, we will still reverse the judgment, if, upon such examination of the record as the time at our disposal will permit, a plain error prejudicial to appellant is found; otherwise, the judgment will be affirmed.

The defendant alleged that, to secure his guaranty of the note, the cashier, who transacted the business for the bank, represented to him that the Dimock Lumber Company was a solvent going concern, with a capital stock of $6,000; that the $1,500 represented by the note which the plaintiff was asked to guarantee would be used exclusively in carrying on the business of the Dimock Lumber Company, whereas in truth, the company's liabilities were more than their resources, the capital stock was worthless, and the note was given in renewal of an old indebtedness of the Dimocks themselves, in which the Dimock Lumber Company was not interested. The theory of the defendant was that there was a combination between the Dimocks and the bank to induce him to become liable for their indebtedness. The bank held about half of the stock of the lumber company as collateral security for this indebtedness, and other collateral, which the defendant testified the cashier represented to him to be ample security. The defendant had been a farmer in Iowa, and at the time of this transaction was dealing in "registered stock" in South Omaha. He testified that he had had no experience in the lumber business, nor in corporate stock and accounts; that he so informed the cashier, and relied upon the cashier's statements. It is not entirely clear that the cashier made false statements of fact such as an ordinary busi-

ness man would be expected to rely upon, but the evidence is complicated and somewhat conflicting, and it presents a question peculiarly for the consideration of a jury. It cannot be said that the verdict of the jury is so wholly unsupported by the evidence that the court must say that it is clearly wrong.

One of the defenses alleged was that the note had been materially altered since its guaranty by the defendant. The court submitted the question to the jury for a special finding as to this allegation, and the jury found that the note had been so altered. The plaintiff contends that the evidence will not sustain such finding, but under the instructions of the court the jury were not allowed to find generally for the defendant, unless they found that the guaranty was obtained by fraudulent representations. The plaintiff, therefore, could not have been prejudiced by submitting the question of alteration of the note to the jury.

We have not found any error in the record requiring reversal, and the judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

J. ARTHUR TILLSON, ADMINISTRATOR, APPELLEE, v. CHESTER HOLLOWAY, APPELLANT.

FILED JUNE 5, 1915. No. 18711.

1. **Executors and Administrators: CLAIMS: SUFFICIENCY OF EVIDENCE.** The findings of the trial court as to the amount of money advanced by defendant to his father and as to the rental value of the land occupied by defendant are approved.
2. **———: LOANS: INTEREST.** H. advanced money to his father and took possession of land of his father's, upon agreement that at some future time they would adjust the matter, allowing for interest and for the use of the land, with no agreement to pay interest or rentals in the meantime. *Held*, that a decree adjusting the accounts should not allow compound interest, nor interest on the rentals.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed with directions.*

W. D. Oldham and *H. M. Sinclair,* for appellant.

Fred A. Nye and *J. A. Tillson, contra.*

SEDGWICK, J.

This case has been in this court twice before. *Tillson v. Holloway,* 90 Neb. 481; 94 Neb. 635. At the last hearing it was remanded for an accounting between the parties. The trial court has stated the account, and has found due to the defendant $2,499.09. The defendant has appealed, and both parties are complaining of the judgment.

The court found that the amount of the defendant's claim against the estate, with simple interest, was $15,159.10. The plaintiff complains of this, and contends that the evidence will not support the finding. Many witnesses were examined, some of them the brothers and sisters of the defendant, who are interested adversely to him, and the evidence is so voluminous that it is not practicable to attempt to analyze it. Several of these witnesses testified orally before the court, and much depends upon the force and consistency of their testimony. So far as the findings depend upon the accuracy and consistency of this testimony, the trial court had the advantage of considering their appearance and manner of testifying, and the surrounding conditions that enabled him to determine the reliability of their testimony, and, as we have often said, under such circumstances we must give careful consideration to the estimate of the trial court as to the probative force of such testimony. We conclude that this finding is not so unsupported as to require us to change it.

The trial court found that the value of the rental of the farm while the defendant had occupied it was $7,200. For the first five years he found that the rental value was 25 cents an acre for each year; for the next ten years he found that the rental was 50 cents an acre for each year, and for the remaining five years he found the rental value to be 75 cents an acre for each year, and computed inter-

est on each year's rental from October 1 of that year to the present time.

When this case was remanded to the district court for an accounting, this court said: "The judgment is therefore reversed and the cause remanded, with instructions to take further evidence, if necessary, and find the amount due defendant with simple interest at 7 per cent. per annum. Against this, offset the value of the use of the land, and enter a decree in favor of plaintiff for possession of the land upon payment of balance due defendant as so found. Unless the same is paid within 90 days from the entry of the decree, the land shall be sold, and costs and defendant's claim paid out of the proceeds, and balance to the plaintiff." 94 Neb. 635. This was upon the theory that the evidence shows that the agreement between the defendant and his father was that no interest should be paid to the defendant on the money which he had advanced to his father, nor any rent paid by the defendant for the use of the land until there should be a final settlement between them and adjustment of the whole matter. Therefore on the money due to the defendant simple interest only should be computed, since there was no interest due until settlement should be made, and for the same reason, interest should not be computed upon the rental of the farm, because there was no rental due until such settlement. If the agreement had been that the interest on the defendant's money should be paid annually, and that the rental upon the farm should also be paid annually, the computation should be made with annual rests offsetting the accumulating interest against the rentals, so that, in either view of the case, the conclusion of the trial court in allowing interest upon the rentals and refusing interest upon accumulations of interest would be irregular. The court should allow simple interest upon the defendant's claim and offset the rentals without interest against this claim.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a finding in favor of the defendant for the amount as heretofore found,

with interest to the date of the decree, from which should be deducted the rental values as found by the trial court, without interest thereon, and a reasonable rental to the date of the decree.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

NYE-SCHNEIDER-FOWLER GRAIN COMPANY, APPELLANT, V. MICHAEL HOPKINS ET AL., APPELLEES.

FILED JUNE 18, 1915. No. 18126.

Deeds: BREACH: REVERSION. A subsidiary corporation of a railroad company was the owner of land suitable for an elevator site adjacent to the tracks of the railroad company. The land was conveyed to a grain company without other consideration than a written contract, wherein it was provided that the grain company should build and operate a grain elevator thereon, the railroad company to furnish a "free in-switch" thereto, and in case of the destruction of the elevator by fire, or otherwise, the grain company should rebuild within a reasonable time, and on failure so to do title should revert to the grantor. The elevator was destroyed by fire April 3, 1910. Prior to July 27, 1911, the grain company had taken no steps toward rebuilding, nor did it then show an unqualified intention to rebuild. *Held*, that the title to the land reverted to the grantor.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed.*

Courtright & Sidner, for appellant.

William Baird & Sons and *Ralph M. Shaw, contra.*

MORRISSEY, C. J.

This action is brought by plaintiff to quiet the title to the real estate involved, an elevator site in the city of Omaha, and to remove clouds from the title. The defendant Hopkins, together with several other defendants, made default, and a decree was entered against them, but the

Chicago Great Western Railroad Company and its subsidiary corporations, the Mason City & Fort Dodge Railroad Company and Omaha Grain Terminals, filed answers and cross-petitions, and from a decree in favor of these corporations plaintiff appeals.

The Chicago Great Western Railroad Company owns all of the stock of the Mason City & Fort Dodge Railroad Company, which in turn owns all of the stock of the Omaha Grain Terminals. The case appears to have been tried on the theory that the subsidiary corporations were not bound by the acts of the parent corporation. But this theory is abandoned in this court, and it is admitted that the real controversy is between the plaintiff company, which, so far as this property is concerned, has succeeded to the rights and interest of the Nye-Schneider-Fowler Company, and the Chicago Great Western Railroad Company, which represents the interests of itself and its subsidiary corporations. Prior to March, 1906, the title stood in the Omaha Grain Terminals. The Chicago Great Western Railway Company has since been reorganized, and is now doing business under the name of Chicago Great Western Railroad Company, and is the real defendant herein. The plaintiff, Nye-Schneider-Fowler Grain Company, is a subsidiary corporation of Nye-Schneider-Fowler Company. For many years this latter company has been engaged in the grain business, and in 1906 it was desirous of securing terminal facilities in the city of Omaha. The Chicago Great Western Railway Company was desirous of securing the business of this grain company, and an agreement was made whereby the terminals company conveyed by deed, absolute in form, the land involved herein to the grain company, but at the same time a contract was made and entered into between the parties, whereby the grain company agreed to erect, maintain and operate a grain elevator, with a minimum capacity of 750,000 bushels, upon the land conveyed, and the railroad company agreed to furnish a "free in-switch" as long as the elevator should be operated by the contracting grain company, or any com-

pany controlled by it, but no longer, and the grain company agreed that, should the elevator be destroyed by fire, or otherwise, it would rebuild the same within a reasonable time, or, failing to thus rebuild, reconvey the real estate to the grantor. The elevator was built according to the agreement, and operated until April, 1910, when it was burned. There was a great quantity of grain in the elevator at the time of the fire, and this continued to burn for several months. Plaintiff took no immediate steps toward the reconstruction of the elevator, but during the summer succeeding the fire there was correspondence between the real parties in interest herein, which shows that the railroad company was desirous of having plaintiff continue to do business over its lines, but that it was anxious to be freed from its contract to furnish a "free in-switch." The matter ran along in an unsettled way until July, 1911, when a new memorandum agreement was drawn up and O. K.'d by Mr. Fowler, acting for the plaintiff company, and Mr. Somers, the general freight agent of the railroad company. We think it must be admitted that plaintiff had forfeited the title under the terms of the contract made in March, 1906, but plaintiff contends that the effect of the July, 1911, memorandum is to cancel in all respects the contract of March, 1906, which required plaintiff to rebuild within a reasonable time, or, on failure so to do, to reconvey the title. The July memorandum was designed to give plaintiff a lease upon a grain elevator owned by one of the railroad company's subsidiary corporations, and plaintiff relinquished all rights to a "free in-switch," and the land in controversy was to be freed from the provisions of the March, 1906, contract. Nine days later Mr. Somers, the freight agent, wrote plaintiff that he had exceeded his authority in attempting to bind the subsidiary corporations, as he was not one of their officers, and submitted two counter propositions, which related to the leasing of the elevator controlled by defendant and the relinquishment of plaintiff's rights under the agreement of March, 1906. He also expressed the hope that at the termination of the lease for the elevator plaintiff would either

rebuild on its old site, or that the relations between the parties would be such that a renewal lease for the elevator might be made, and asked an acquiescence in the proposed modifications. Without waiting for a reply, the railroad company on the following day issued its new tariff providing for an in-switching charge.

The original conveyance was made to plaintiff for the purpose of having grain elevators built in order that the railroad company might get the freight resulting therefrom. The correspondence shows that after the fire the railroad company desired to have the elevator rebuilt, but it shows also that the railroad company was complaining of the burden which the "free in-switching" clause of the contract placed upon it, and was desirous of being relieved from this burden. On the other hand, the record discloses a disposition on the part of the plaintiff to defer the erection of a new elevator, and, perhaps, a desire to take over an existing elevator in order that it might thereby eliminate a competitor. Mr. Fowler, who is shown to have absolute authority in the management of plaintiff's business, was examined as a witness, and when questioned as to the intention of himself or company to rebuild said: "I intended to rebuild unless certain matters that were affecting the Omaha market went adversely." This does not state an unqualified intention of rebuilding. Being further interrogated on the subject, he said: "A. Why, briefly, at that time we had one proposition before us for the purchase of a large elevator plant at practically half its cost, and another smaller one on a very reasonable basis; and it showed itself whereby we might be able to decide to let the Omaha Grain Terminals investment go, that land, and take on the other plant at a very profitable basis, and reduce the elevator facilities competing with us one plant. And, as a result, I was putting off our decision, any decision on our rebuilding, that is, open statement that we would rebuild, as long as possible." This demonstrates that plaintiff was awaiting future developments before making a decision as to whether it would abandon the real estate or whether it would rebuild, and,

in view of the fact that the elevator burned in April, 1910, and no step was taken toward its reconstruction when the memorandum of July 27, 1911, was made, we reach the conclusion that plaintiff had forfeited its right to the real estate, and, unless the memorandum of that date is a valid and enforceable contract, plaintiff must be held to have no interest in the real estate. The trial court found that the memorandum of July 27 was not a contract, but only a memorandum of the different propositions proposed by the parties. In entering the decree the court said: "It indicates on its face that it is not a completed contract. Certain things are proposed, certain steps are left to be decided in the future; if necessary this and that is to be done. 'These details will be worked out in an amicable way fair to both.' 'The second party will take care of all minor matters relating to the corporation.' All the way through, it seems to me, it indicates that it is rather tentative than final in its nature." And in this conclusion we are constrained to believe the trial court is correct. The memorandum never was carried out in its entirety. On August 8 plaintiff was notified that defendant was not bound by paragraph 2 thereof, which was in effect a repudiation of the whole memorandum and the submission of a counter proposal.

It is apparent that plaintiff did not rebuild within a reasonable time, and the evidence on its behalf does not indicate any present intention to rebuild. On the facts and evidence, we believe the trial court was warranted in granting the prayer of defendant's cross-petition and quieting the title as therein prayed.

The judgment of the district court is

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

WILLIAM L. HUFFMAN, APPELLANT, V. HENRY MOTOR COMPANY ET AL., APPELLEES.

FILED JUNE 18, 1915. No. 18139.

Carriers: BILLS OF LADING: DRAFTS: PAYMENT: RIGHT TO PROPERTY. Bills of lading are symbols of property, and when properly indorsed and delivered to a bank with drafts for the purchase price of merchandise attached, and the bank pays the amount of the drafts to the drawer, the bank is entitled to the possession of the merchandise until the drafts are paid in full.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Charles W. Haller and *Byron G. Burbank,* for appellant.

E. W. Simeral, contra.

MORRISSEY, C. J.

Plaintiff was engaged in the automobile business in the city of Omaha, and had in his employ Fred C. Hill, his brother-in-law, and, being desirous of taking the agency for the cars built by the Henry Motor Company without having his name appear in the contract, Hill, acting for plaintiff, entered into a written contract with the motor car company for the sale of that company's cars. By the terms of this contract the dealer was to pay freight and all cost of transportation from the factory at Muskegon, Michigan, to Omaha, and it was provided that the title and ownership in the cars should remain in the motor car company until the purchase price was paid in full. The dealer contracted for not less than 50 cars. The contract recites that the sum of $200 was paid the manufacturer at the time the contract was made to apply on the first shipment. The plaintiff's testimony fixes the amount at $300, and this is not disputed. On May 3, 1910, three motor cars were shipped to Hill, and on May 24, 1910, another shipment of three motor cars was made. On each of these dates a

draft for the purchase price was drawn by the manufacturer on Hill, and the bills of lading were assigned and delivered to the bank, and these drafts were cashed by the National Lumberman's Bank of Muskegon, Michigan. The drafts with bills of lading attached were forwarded to the First National Bank of Omaha, and payment was demanded of Hill. He failed to make payment, and the six automobiles, loaded in two freight cars, stood on the tracks from about June 1 until about August 1, when Mr. DeMange, an attorney for the motor car company, went to Omaha and made arrangements with Huffman, who now says that he is the assignee of Hill, but admits that the original contract was really made for his benefit, under which Huffman paid the freight, demurrage, cartage, etc., and on an order from the National Lumberman's Bank to the First National Bank of Omaha the motor cars were placed in storage in a warehouse, and the warehouseman gave his receipt for the motor cars to the First National Bank, as agent of the National Lumberman's Bank, and an arrangement was made whereby Huffman might redeem any one of the cars by paying one-sixth of the total sum of the drafts. Huffman subsequently took out one of the cars and paid the proper amount on the draft. The other cars remaining unsold, four of them were later shipped to Kansas City, Huffman assisting in making the shipment. The sixth and last car being ordered shipped to Kansas City, Huffman caused an attachment to be levied thereon to cover the $300 deposit which had been made, and the freight, demurrage, etc. Service was never had upon the motor car company, but the National Lumberman's Bank intervened, and filed an answer setting up its claim under the drafts with bills of lading attached. The cause was tried in the county court, and the parties stipulated "that the right of possession to said motor car be tried in this action without the necessity of resorting to other actions, possessory or otherwise." The court found that at the commencement of the action the intervener, the National Lumberman's Bank, was the owner of the property and entitled to its possession. An appeal was taken to

the district court, where the same issue was tried to the court, with a finding and judgment in favor of the intervener, and plaintiff appeals.

The only issue is between plaintiff and the National Lumberman's Bank, and that is: The right to the possession of the car attached. The original contract made by Hill, in whose place Huffman stands, expressly provided that the ownership of the property should remain in the manufacturer until the dealer had paid therefor in full. It is clear, then, that at the time these automobiles were loaded in Muskegon, and the drafts drawn on the consignee with the bills of lading attached, the ownership was in the manufacturer. The indorsement and delivery of these bills of lading to the bank was in effect a delivery of the property (6 Cyc. 426; 4 R. C. L. 34, 35, 36), and the possession thus secured never passed from the bank. Under the contract of agency, plaintiff was bound to pay the freight, demurrage, etc. His deposit of $300 was not such a payment on these cars as entitled him to their possession. DeMange was not the agent of the bank, but was the agent of the manufacturer. The National Lumberman's Bank selected its own agent, the First National Bank of Omaha, and its telegraphic direction, which we find in the record, directed that it accept warehouse receipts for the six automobiles running to the bank in Omaha, as agent for the intervening bank, with receipts so arranged that the dealer might take out a car by paying the proportionate amount of the drafts. Huffman was bound to take notice of the interest of the National Lumberman's Bank at the time he claims he was dealing with DeMange, because the bills of lading were attached to the drafts, which were payable to the intervening bank, and the bank's interest and right of possession was apparent. While it is contended by Huffman that the cars were not according to the contract, and by the bank that Hill was unable to raise the money to meet the drafts, we are not called upon to decide any question between Huffman and the motor car company, for that company is not in court. The warehouse receipts, based

as they are upon the bills of lading, carry with them the right of possession.

No error is found in the record, and the judgment is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

15-3-619

LUCY E. DROLLINGER, APPELLEE, V. HASTINGS & NORTHWESTERN RAILROAD COMPANY, APPELLANT.

FILED JUNE 18, 1915. No. 18155.

1. **Eminent Domain: ASCERTAINMENT OF DAMAGES: VIEW OF PREMISES.** Upon a trial to determine the compensation to be awarded a landowner, where a railroad company exercises the right of eminent domain in crossing his farm, it is proper for the trial court to permit the jury to view the premises, and to take into account the result of their observations, and make it, in connection with the other evidence, the basis of their verdict.

2. ———: ———: ———: **DIRECTION OF COURT.** The language of the court in sending the jury to inspect the premises, set out in the opinion, *held*, a substantial compliance with the statute.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John M. Ragan and *Nelson H. Loomis*, for appellant.

J. W. James and *James E. Addie, contra.*

MORRISSEY, C. J.

The Hasting & Northwestern Railroad Company, desiring to build a railroad across a quarter-section of land owned by plaintiff, instituted condemnation proceedings in the county court of Adams county. From an award by appraisers, duly appointed, an appeal was prosecuted to the district court, where the cause was tried to a jury, and a judgment entered in favor of the plaintiff in the sum of $3,853.50. The railroad company has appealed, and its

assignments of error will be taken up in the order presented in its brief.

The jury viewed the premises, and were, under an instruction by the court, permitted, in making up their verdict, to take into consideration the knowledge thus gained. Appellant says this was a violation of section 3, art. I of the Constitution of this state, and in contravention of section 1 of the fourteenth amendment to the Constitution of the United States, saying: "When the jury took into consideration the facts that came to their knowledge from this view of the premises, and treated them as evidence, the trial judge could not act understandingly in determining whether the verdict should be set aside, and upon appeal only a part of the evidence can be embodied in the bill of exceptions, and thus this court has only a part of the evidence before it."

Rev. St. 1913, sec. 7847, provides for such view in the discretion of the court, and in *Chicago, R. I. & P. R. Co. v. Farwell,* 59 Neb. 544, this court held: "The view of the *locus in quo* by the jury is evidence, and not merely a means of enabling the jury better to construe and apply the evidence adduced in court." Upon rehearing (60 Neb. 322) this rule was adhered to, and in discussing the question Judge Sullivan, speaking for the court, said: "This is the rational rule; by its adoption a fact is recognized and a fiction abolished. In whatever capacity men act they will not reject the evidence of their own senses; and it is futile and almost foolish to direct them to do so. The human mind has its limitations; and neither faith in human testimony nor cautionary instructions from the presiding judge will make jurors accept as true what their own senses assure them is false. This is so plain a fact that courts have little excuse for feigning ignorance of it." We find no reason for departing from the rule heretofore laid down, or differing from the reasoning of the learned judge quoted.

It is next urged that the trial court did not observe the provisions of the Code in sending the jury to view the property, in that, while the statute provides that the jury

shall be conducted in a body, the jury went in different conveyances, and it is alleged that no person was appointed by the court to show the jury the premises, nor were they cautioned against forming or expressing an opinion until the cause was finally submitted to them. A reviewing court would be captious indeed in finding it error to permit the use of more than one vehicle in conveying the jury. The court told the jury they would be permitted to go with the sheriff, and in his charge, to view the premises; that conveyances would be furnished for them; that during the time they were out they should not talk to anybody about the matter nor permit others to talk to them. He said: "Of course, this property will have to be pointed out to you, but I suppose the sheriff knows where this property is. * * * You go over there and look it over together, and keep your eyes open, but do not discuss it among yourselves." This was a substantial compliance with the statute, and, if defendant desired the court to give a fuller and clearer admonition to the jury, it was its duty to have made the proper request at the time.

Finally, it is said that the verdict is excessive, and is not supported by sufficient evidence. All of the testimony shows that this was a valuable farm. Witnesses for the defendant as well as for the plaintiff place the value at from $115 to $130 an acre prior to the time of this appropriation. 5.86 acres were taken for the railroad right of way, and the farm was left in two triangular pieces. Disinterested witnesses with long experience in the real estate business, who have lived in the city of Hastings for a great many years, have placed the damages much higher than the sum awarded by the jury. It is true that witnesses for defendant have placed the damage somewhat lower, although one of defendant's witnesses makes the amount only $30 lower than that awarded by the jury. Taking the record as a whole, the verdict seems to be sustained by a preponderance of the evidence.

The proceedings are without error, and the judgment is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

MARSH-BURKE COMPANY, APPELLEE, v. J. H. YOST, APPELLANT.

FILED JUNE 18, 1915. No. 18106.

1. **Monopolies**: RESTRAINT OF TRADE: ILLEGAL COMBINATION. A combination or conspiracy between two or more persons against any person, firm or corporation to prevent competition in business in this state, which is carried into effect, is a violation of the provisions of chapter 45, Rev. St. 1913, commonly called the "Junkin Act."

2. ———: LIABILITY. An overt act in furtherance of an illegal combination to create a monopoly and stifle competition in business, resulting in injury to a third person, is actionable, and the members of the combination are liable to the injured person for all damages proximately flowing from their illegal conduct.

3. **Conspiracy**: PROOF. A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.

4. ———: EVIDENCE: ADMISSIBILITY. Where an unlawful conspiracy or combination is established, everything said, written or done by either of the conspirators in the execution or furtherance of the common purpose is deemed to have been said, done or written by every one of them, and may be proved against each and all of them.

5. **Instructions** examined and found to contain no reversible error.

6. **Conspiracy**: DAMAGES. Where the business of a coal company, owning a plant of the estimated value of $20,000, exclusive of real estate, shown to have been making a profit of $13,000 a year is destroyed by the unlawful acts of a combination to prevent competition, a judgment for $23,000 damages is not excessive.

7. **Quære.** The constitutionality of that part of the Junkin Act providing for a recovery in excess of compensatory damages is *not* determined.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Hall & Bishop and *Mahoney & Kennedy,* for appellant.

E. C. Strode and *M. V. Beghtol, contra.*

BARNES, J.

The Marsh-Burke Company, a corporation, brought this action against J. H. Yost, Herbert L. Laird, and Henry M. Boyer, under the provisions of article VIII, ch. 45, Rev. St. 1913, entitled "Unlawful Restraint of Trade," commonly called the "Junkin Act," to recover damages which it alleged it had sustained by reason of a conspiracy of the parties above named to drive the plaintiff out of the business of selling coal in the city of Lincoln and parts of the states of Nebraska, Kansas, and South Dakota.

The petition alleged, in substance, that, for nine years next before the commencement of the action, plaintiff had been a corporation engaged in the business of selling coal at retail and wholesale in the city of Lincoln and throughout the states of Nebraska, South Dakota and Kansas; that defendant J. H. Yost, a resident of Lincoln, was engaged in conducting a line of 30 or more lumber and coal yards in various towns in the state of Nebraska; that defendant sells at retail large quantities of coal, and at all times has been engaged in the active management of his said yards; that Herbert L. Laird is the secretary of the Western Coal Dealers' Association, and that Henry M. Boyer is the division sales agent and territorial manager of the McAllester Fuel Company of Oklahoma, and has the exclusive charge of placing agencies for a brand of fuel known by the trade-name of Bernice coal; that plaintiff, since 1904, had the exclusive agency for the sale of Bernice coal in and about the city of Lincoln up to and until the 28th day of October, 1911, and had at all times purchased that brand of coal from the McAllester Fuel Company through the defendant Boyer; that, during the time from 1904 to October 28, 1911, the plaintiff had expended large sums of

money in the employment of solicitors and in advertising said coal and in extending its sale throughout the said city of Lincoln and vicinity, and had built up a large retail trade for the sale of Bernice coal, amounting to over $100,000 a year. In addition to retailing coal in Lincoln, the plaintiff, in April, 1911, and subsequently thereto, was engaged in selling coal direct to consumers outside of the city of Lincoln and throughout South Dakota, Kansas, and Nebraska at wholesale prices and in car-load lots by means of circulars and letters, and its business in said outside territory had increased to an average of from $4,000 to $5,000 a week; that defendant Yost was a large dealer in coal at his yards in Nebraska, and by plaintiff's sales to consumers in car-load lots at wholesale prices the defendant Yost became angry and displeased, and claimed that plaintiff had interfered with his business and profits in his territory and principalities, that plaintiff was violating the prescribed rules and practices of the members of the coal dealers' association, and called upon the plaintiff and sought to induce it to desist from continuing its sales to consumers in car-load lots at wholesale prices; that plaintiff refused to discontinue its said business; that thereupon defendant Yost persuaded and induced defendants Laird and Boyer to enter into a combination against the plaintiff to injure its credit and refuse to sell it any coal, and to ruin its business and put a stop to the plaintiff's competition with defendant Yost in selling coal, and to that end took steps by which Yost induced the defendant Boyer to cancel the agency of the plaintiff for the sale of Bernice coal, and persuaded the defendant Laird to stop other wholesalers of coal doing business in Chicago and at other points from selling coal to plaintiff; that defendants carried out the agreement and combination, and plaintiff was unable to purchase any coal with which to carry on its business, and was thereby driven from business, and its trade was entirely ruined and destroyed; that defendant Yost made statements derogatory to plaintiff's credit, to its damage in the sum of $95,000, for which amount plaintiff prayed judgment.

Summons was personally served on the defendant Yost, but defendants Baird and Boyer, being nonresidents of this state, could not be served, and the trial proceeded against Yost alone.

There was a motion to make the plaintiff's petition more definite and certain, which was sustained in part. The plaintiff complied, and thereupon a demurrer to the petition was filed, which was overruled, and the defendant answered by a general denial. Trial to a jury in the district court for Lancaster county resulted in a verdict for plaintiff for $38,000. On the hearing of the motion for a new trial, plaintiff was required to remit all of the verdict except $23,000. The motion was then overruled, judgment was rendered on the verdict, and the defendant has appealed. The plaintiff has also perfected a cross-appeal.

It is contended by defendant that the evidence does not show any conspiracy in restraint of trade on the part of any of the defendants, and that therefore there was no violation of the Junkin Act. As we view the record, it shows that Yost, Laird and Boyer sought one common end, which was to compel plaintiff to cease the business of selling coal to consumers in car-load lots at wholesale prices in the territory in which Yost was conducting his lumber and coal yards.

The oral testimony and the deposition evidence comprises more than 500 pages, and it is impossible to refer to the whole of it in the space alloted to this opinion. The substance of the evidence is that plaintiff's agency for the sale of Bernice coal was the most valuable one in the whole state. It had extensively advertised its business in the newspapers and by electric signs since 1904, until the Marsh-Burke Company and Bernice coal had become widely known and associated together. A business had been established of such proportions that it was later divided among five other dealers. It was shown that, if plaintiff's agency for that particular brand of coal was canceled, its business would be crippled and its credit impaired, not only because it had not been able to hold the agency, but because the plaintiff's income from its specialty would be

greatly lessened. When Yost discovered that plaintiff was buying coal in car-load lots and selling it to customers at wholesale prices in his so-called territory, he immediately diverted two cars of Bernice coal from his Grand Island shipment to Lincoln and advertised it for sale to consumers at wholesale prices in that city. This immediately brought Boyer and his sales agent, Fitzgerald, to Lincoln to see defendant Yost. In an interview with him at that time the following conversation, in substance, took place, according to the testimony of Mr. Fitzgerald. We went to see Mr. Yost, as we were expected to protect Burke's agency in this city. Yost said Burke was shipping coal into his towns. He did not claim that Burke was shipping Bernice coal, which Boyer furnished him, to those points. We talked to Mr. Yost about Burke shipping coal out into his towns. I had seen Yost's ad in the paper. We were only interested so far as the sale of our own coal was concerned. Mr. Yost was selling Bernice coal in Hastings and Grand Island. So far as I know, Mr. Burke had never consigned a car of Bernice coal out of Lincoln. We did not permit him to do that. We asked Burke not to do so, and he said he would not. We had taken no action in the matter until we came to Lincoln.

The defendant Yost testified that Mr. Boyer called on him about October 20, 1911. His testimony was as follows: "Mr. Fitzgerald and Mr. Boyer came to our office. Q. In the First National Bank building? A. Yes, sir. Q. About what time of day? A. Well, I should judge about 10, 9 to 10 o'clock in the morning. * * * The first thing he said—he says: 'These two cars of Bernice coal that I had ordered of him, for Grand Island, and I diverted them to Lincoln.' I says: 'Yes, sir.' He says: 'What did you do that for? Mr. Burke has the exclusive agency here, and we don't allow anybody, and don't ship any coal in here as long as Burke has got the agency.' * * * I told him that we were in a scrap, and I wanted as much ammunition as I could get to fight to protect my own interests. He gave me a little roasting for doing that, and stayed about 10 or 15 minutes, and then they

went on. * * * Q. When you diverted the shipment of the Bernice coal, you knew the Marsh-Burke Company had the exclusive agency for the sale of the Bernice coal in the city of Lincoln? A. Yes, sir. * * * They would not probably ship it to me direct in Lincoln. * * * They probably would not permit it."

Mr. Boyer testified: "The Marsh-Burke people had the agency for our Bernice coal at Lincoln, a very popular coal, too, and it was possibly thought on that account that I might have some influence in the matter. Q. The McAllester Fuel Company furnished and supplied for the Nebraska territory a very large amount of coal, not only in Lincoln, but throughout the state, didn't they? A. We had a pretty good tonnage in Nebraska. Q. So that you were sort of in the situation of being compelled to take a hand in that matter, in order to protect your own business? A. I was forced into it. * * * Q. On the one hand, was the demand from Mr. Yost that you make the Marsh-Burke Company stop the sale of coal on mail orders, or suffer the displeasure of Mr. Yost, and dealers of coal out in the state; and, on the other hand, if the Marsh-Burke Company took offense, you would suffer their displeasure in the sale of coal in the city of Lincoln through that agency? * * * A. Well, I was placed in the position where the best I got was the worst of it. * * * As I understood, Mr. Yost's position was that the Marsh-Burke people were shipping coal to the consumer in towns at which he was located, and naturally that interfered with his business in those towns. * * * He wanted me to see if I could get them to stop it. * * * He wanted me to cancel my agency with them for Bernice coal. * * * It would seriously embarrass their retail business in Lincoln. Q. And put them out of business, wouldn't it? A. I don't know that he said that. Q. That was what you inferred from what he said, that it would break them, didn't you, and put them out of business? * * * I knew that if I continued selling to the Marsh-Burke people in Lincoln that I would be advertised all over the state of Nebraska as doing business with a mail order concern, and

as the result of that I knew that the business of the legitimate coal dealers in Lincoln, I mean, in Nebraska, would be lost to a very large extent to my company. Q. Did anything that Mr. Yost said call your attention to the fact that you would be advertised as furnishing coal to a mail order concern? A. I knew what would happen to me." The result of this and other conferences between Boyer and defendant Yost was the canceling of the Bernice agency held by the Marsh-Burke Company.

It appears that Mr. Laird's assistance was a matter which could not be handled as easily as the Boyer affair; that there would be only one way in which he could be brought into the matter, other than by securing his voluntary assent to the scheme, and that would be to make an association matter out of it, by making it a trade matter in which, by virtue of Laird's employment as secretary of the Northwestern Coal Dealers' Association, he would be compelled to enter into the combination. There seems to be no direct evidence as to the way in which Mr. Laird became one of the conspirators, although there seems to be ample evidence as to his participation in it. It appears that the trade war in Lincoln was instigated and fathered by Yost for the purpose of withdrawing the plaintiff from the mail order business. It would not seem to make much difference whether Laird conspired for trade reasons, for personal reasons, for malicious reasons, or for no reasons at all. The fact remains that he did, in pursuance of his conferences with Boyer and Yost, cause the members of the Northwestern Coal Dealers' Association to cease selling coal to the Marsh-Burke Company. The plaintiff called upon Mr. Laird at his office in Chicago to protest against that action. Burke testified that Laird said that, as long as plaintiff remained in the mail order business, he would continue to distribute information to dealers, miners, wholesalers, and producers that plaintiff was in the mail order business, and that those men who sold the plaintiff coal could not expect to enjoy the trade of others as long as they did so. Laird testified that he told Burke what

would happen to him in Lincoln when mention was made of the advertising in trade journals to his discredit. The testimony shows that Laird told the plaintiff that Yost was making a great deal of money; that he was powerful and influential, and that plaintiff could not withstand his opposition; that he (Laird) had a fund of $2,000,000 for the purpose of stopping the mail order business. It seems that Laird's influence was powerful enough to meet the demands made by Mr. Yost—that plaintiff should be made to stop the mail order business. It is apparent that it was enough for Laird to explain his mission when he took up the question with the different coal companies belonging to his association that they were on the list as doing business with the plaintiff. Laird had behind him the whole power of the organization called the Northwestern Coal Dealers' Association, and, at the demand of Yost, he used that power to such an extent that the plaintiff was unable to purchase coal from any member of the association. It appears that interviews were had with the other coal dealers in the city of Lincoln, with a view to induce them to use their influence in stopping the mail order business of the plaintiff. There is also some evidence in the record tending to show that Yost took certain steps to injure the credit of the plaintiff. Several interviews were had between Yost, the other coal dealers in the city of Lincoln, and Laird and Boyer, the result of which was to practically put the plaintiff out of the coal business.

In 5 R. C. L. (Conspiracy) sec. 37, p. 1088, it is said: "Conspiracies need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions and circumstances which vary according to the purposes to be accomplished. The very existence of a conspiracy is generally a matter of inference deduced from certain acts of the persons accused, done in pursuance of an apparently criminal or unlawful purpose in common between them. The existence of the agreement or joint assent of the minds need not be proved directly. It may be inferred by the jury from other facts proved. It is not necessary to prove that

the defendants came together and actually agreed in terms to have the unlawful purpose, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. If, therefore, one concurs in a conspiracy, no proof of agreement to concur is necessary in order to make him guilty." *Spies v. People,* 122 Ill. 1, 3 Am. St. Rep. 320, 482; *Commonwealth v. Gillespie,* 7 Serg. & Rawls (Pa.) 469; *Ex parte Rogers,* 10 Tex. App. 655, 38 Am. Rep. 654; *Rex v. Brisac,* 4 East (Eng.) 164; *Martin v. State,* 89 Ala. 115, 18 Am. St. Rep. 91; *Ferguson v. State,* 134 Ala. 63, 92 Am. St. Rep. 17, and note; *Franklin Union v. People,* 220 Ill. 355, 4 L. R. A. n. s. 1001; *Kelley v. People,* 55 N. Y. 565; *People v. Flack,* 125 N. Y. 324, 11 L. R. A. 807; *Gibson v. State,* 89 Ala. 121; *People v. Lawrence,* 143 Cal. 148, 68 L. R. A. 193; *Garland v. State,* 112 Md. 83; *State v. Ryan,* 47 Or. 338.

"While a combination of dealers, containing no elements of an intent to restrain trade for the purpose of greed or profit, or of malice, is not an unlawful conspiracy, yet an overt act in furtherance of an illegal combination to create a monopoly and stifle competition in business, resulting in injury to a third person, is actionable, and the members of the combination are liable to the injured person for all damages proximately flowing from their illegal conduct." 5 R. C. L. (Conspiracy) sec. 44, p. 1095. *Employing Printers Club v. Doctor Blosser Co.,* 122 Ga. 509, 106 Am. St. Rep. 137, 69 L. R. A. 90; *Klingel's Pharmacy v. Sharp & Dohme,* 104 Md. 218, 118 Am. St. Rep. 399, 7 L. R. A. n. s. 976.

We therefore conclude that the evidence was sufficient to warrant the jury in finding that Yost, together with Boyer and Laird, were guilty of a combination in restraint of trade, and its result was injury to the plaintiff in its business as coal dealers.

Section 4045, Rev. St. 1913, provides, among other things: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor." Section 4046, provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce, within this state, shall be deemed guilty of a misdemeanor." By section 4062 it is provided: "Any person who shall be injured in his business or property by any other person or persons by reason of anything forbidden or declared to be unlawful by this article may sue therefor in any court of record in this state, in the county in which the defendant or defendants reside or are found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

It seems clear to us that the acts of Yost, performed in conjunction with those of Boyer and Laird, amounted to a violation of the provisions of the Junkin Act, and constituted a restraint of trade and commerce within this state. *Farley v. Peebles,* 50 Neb. 723; *Cleland v. Anderson,* 66 Neb. 252; *State v. Adams Lumber Co.,* 81 Neb. 392.

The Junkin Act declares the public policy of this state toward monopolies and combinations in restraint of trade. The sweeping character of the provisions of the act and the penalties provided for its violation evidence the attitude of the people of the state toward an attempt on the part of one man or any group of men to gain for themselves an advantage in trade or commerce by so manipulating affairs that they may stifle competition or regulate prices; and we are of opinion that for the acts of the defendant plaintiff was entitled to compensatory damages. This brings us to the consideration of the amount of its damages. It must be conceded, as claimed by the defendant, that the measure of damages for the interruption or

destruction of a going concern is the loss of profits proved to a reasonable certainty. The plaintiff was a going concern with a constantly increasing business. Its books, together with a compilation of the same, were introduced in evidence. They showed plaintiff's profits for the years 1907-1911, inclusive, on Bernice coal alone, to be from $539.50, the first year, to $2,502.06, the last year. On other coal plaintiff showed a profit as follows: 1907, $3,539; 1908, $4,361; 1909, $4,141; 1910, $3,819—this without including the odd cents. On plaintiff's mail order business it made a profit in 1911 of $10,800, and a total profit in the year 1911 on all coal sold of $13,995.72.

At the time when the defendant made the attack on plaintiff's business it owned 12 wagons, 22 horses, and a suitable equipment for the delivery of coal to its customers in Lincoln. It owned yards near the tracks of the Rock Island railroad, and had an office equipped to do a general coal business. The value of its plant was shown to be $20,000, exclusive of real estate. Its business had been skilfully managed by A. F. Burke, and had steadily increased from year to year. The evidence showed that, in less than a year after defendants commenced the attack, the business was completely ruined, and the company was unable to purchase coal in any considerable quantities from any wholesale dealers. This was the penalty exacted by defendant Yost, with the aid of Boyer and Laird, for the competition which plaintiff created in the territory which Yost claimed as his own.

The jury returned a verdict in plaintiff's favor for $38,000, on which the court rendered judgment. On a motion for a new trial plaintiff's recovery was reduced to $23,000, and for that amount the court finally rendered a judgment against the defendant Yost. A careful examination of the evidence has satisfied us that the judgment is not excessive. The attack on plaintiff's business made by Yost, Boyer and Laird having been sufficiently shown, defendant's objections to the evidence were without merit. The instructions given by the court and those tendered by the defendant, which were adopted and given in substance,

show that the case was properly submitted to the jury, and defendant's exceptions on the question of instructions were properly overruled.

By its cross-appeal plaintiff contends that the district court erred in refusing to render a judgment in its favor for triple damages. It must be observed that the plaintiff, by its petition, prayed only for compensatory damages. No claim was made in any of the pleadings or proceedings at any time for triple damages, as provided by section 4062 of the Junkin Act, until after the trial court had rendered its judgment on the verdict. The case appears to have been tried and submitted to the jury on the theory that plaintiff should recover only compensation for the injuries it had sustained by defendant's unlawful acts. It would also seem that plaintiff, by filing its remittitur of $15,000, and asking the court to render a judgment for $23,000, was not thereafter in a position to require the court to triple the amount of the judgment. We therefore consider that we are not required to pass on that question, and we decline, in this case, to determine the validity or constitutionality of that provision of the statutes.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

SEDGWICK, J., dissenting.

This is a very interesting case and very important, not only in the amount involved, but in the novel questions presented. The evidence shows that there are two classes of dealers in coal and lumber. Some dealers establish a yard and office in a town, keep a stock of coal, pay taxes on their property, and sell the coal out to consumers at retail. The other class of dealers do what is commonly called a mail order business. They maintain no yards and do not keep a stock of coal, but take orders, and then fill those orders by buying and having the coal shipped directly to their patrons. There is rivalry and hostility between these two classes of dealers, so much so that mine-owners who

sell to mail order houses are not able to sell to what are called the regular dealers. The evidence shows that the plaintiff had coal yards in Lincoln and sold here at retail prices; those prices being sufficient to pay local expenses, taxes, insurance, and presumably a reasonable profit. The plaintiff also began doing a mail order business in the towns where the defendant had yards and was selling at retail. The defendant objected to this and tried to stop it. Was that in itself wrong? This is an important question, because it is common, as we all know, for regular dealers in all lines to object to mail order business and to try to persuade their customers not to deal with mail order houses. Are they violating the law when they do so? This question is not answered by the opinion. The defendant, in retaliation, began doing a mail order business in Lincoln. Was that unlawful? Of course, if it was unlawful for the defendant to do a mail order business in Lincoln, it was unlawful for the plaintiff to do a mail order business in the towns where the defendant had yards; and therefore if the defendant was wrong in starting a mail order business in Lincoln, and it would injure the plaintiff by interfering with its mail order business, that is, if it was only done to stop the plaintiff from carrying on its mail order business, could the plaintiff complain and recover damages from the defendant because the defendant was doing just what the plaintiff had before started to do?

The evidence shows that there was an association of coal dealers. The defendant, it appears, had belonged to this association, but did not at the times complained of in this case. One of the functions of this association is to keep the coal dealers posted as to what is going on. The mine-owners cannot sell to the mail order men and the regular dealers at the same time, because the regular dealers will not buy of one who is selling to a mail order man. The association informs the mine-owners who are mail order men and who are regular dealers. The opinion does not say whether this is wrong; but as the defendant was not a member of the association at the time, and there is no evi-

dence that he participated in notifying the mine-owners as to who were mail order men, I suppose it makes no difference in this case whether the association was doing wrong or not. When the defendant commenced in retaliation doing a mail order business in Lincoln, it created a great furor among the dealers here. They notified their association, and they had meetings and sent out and called the defendant in to one of their meetings and questioned him, and he informed them he was doing it in retaliation; that he had the same right to do a mail order business in Lincoln that the plaintiff had to do the same kind of business in towns where his yards were located. Of course, the defendant knew that this would force the dealers here and the association to take the matter up with the plaintiff, and the defendant did it for the purpose of stopping the plaintiff from doing a mail order business in towns where his yards were located; that is, by introducing the mail order business into Lincoln and other places, he would start up such a disturbance that the parties interested would labor with the plaintiff and probably stop it from doing a mail order business in towns where the defendant's yards were located. Was that a conspiracy? Was the defendant wrong in so doing? The opinion does not answer this question. Does the evidence show directly or by circumstance that the defendant agreed with anybody to do any specific act or thing that would compel or induce the plaintiff to stop its mail order business? If the defendant did so agree with anybody, would that be a conspiracy, within the meaning of the law? The opinion does not answer this question either.

There does not seem to be any evidence that any one objected to plaintiff's retail business in Lincoln. No objection was made against plaintiff as a "regular dealer." It was plaintiff's mail order business that made the trouble. It seems that, as business was carried on in this state, one could not carry on a "regular" coal business, that is, maintain yards and sell at retail at such price as would warrant the use of the necessary capital, the payment of taxes, and those calls for local improvements that business

men must respond to in the towns where they live and their business is located, and at the same time do a mail order business in other towns of the state. The mine-owners who wanted the trade of the regular dealers could not sell to mail order men. If they did, they would lose their regular customers. While plaintiff confined its mail order business to towns in which the defendant maintained yards, no one but defendant would take notice of the fact. It was only necessary that the association should know that plaintiff was a mail order concern and was doing that sort of business in some towns, while in others it was professing to be a regular dealer and was selling at retail prices which would warrant the maintaining of yards for that purpose. As soon as this knowledge came to the association, the information was passed along to mine-owners who were selling to plaintiff, and those mine-owners who were selling to plaintiff, especially Mr. Boyer, soon let plaintiff know that the patronage of the regular dealers was preferred, and the mail order men could not buy from them. Is there evidence that Yost did more than to take the most effective means to make it known that plaintiff, while maintaining yards as a regular dealer, was becoming a mail order concern also?

The opinion says: "As we view the record, it shows that Yost, Laird and Boyer sought one common end, which was to compel plaintiff to cease the business of selling coal to consumers in car-load lots at wholesale prices in the territory in which Yost was conducting his lumber and coal yards." The opinion assumes that this would be a violation of the Junkin Act, without directly saying so. "Sought one common end" is a mild way of stating a conspiracy. If the "common end" was unlawful, it is very important to make that clear in a manner that we can stand by and enforce hereafter. The thing is so very common in all parts of the state that there are few regular retail dealers in any line of business that are not directly interested in this view of the law. Has a regular retail dealer a right to try to stop a mail order business in the town where his property and interests are located? It

may be unlawful, but there is at present a difference of opinion on the subject throughout the state, and if that is the gist of the claim for damages, as it seems from this opinion to be, we ought to make our position clear and unequivocal. Does the evidence quoted in the opinion prove that Yost did some unlawful act to prevent plaintiff's mail order business? What unlawful act did he do? The opinion does not specify. Boyer testified that Yost "wanted me to cancel my agency with them for Bernice coal." No doubt, under the circumstances, Yost wanted him to do that, but how did Boyer find out that Yost wanted him to cancel plaintiff's contract? Yost did not ask him to cancel it. Boyer knew from existing conditions that every regular retail dealer in the state would want him to cancel plaintiff's contract if plaintiff persisted in the mail order business. The evidence quoted in the opinion, instead of proving that Yost asked Boyer to cancel plaintiff's contract, proves the contrary. "I knew that if I continued selling to the Marsh-Burke people in Lincoln that I would be advertised all over the state of Nebraska as doing business with a mail order concern, and as the result of that I knew that the business of the legitimate coal dealers in Lincoln, I mean, in Nebraska, would be lost to a very large extent to my company. Q. Did anything that Mr. Yost said call your attention to the fact that you would be advertised as furnishing coal to a mail order concern? A. I knew what would happen to me." The fact that the association knew that he was selling to a mail order house would be enough to ruin his business in the state. Yost's act in beginning a mail order business in Lincoln was enough to inform the association what was going on, and this seems to be all that the evidence quoted in the opinion shows that Yost did.

It seems to me that the importance of the matter demands that the opinion should state specifically what provisions of the Junkin Act were violated, what unlawful means were used, what facts evidence a conspiracy, and the evidence that proves that Yost entered into the conspiracy and did unlawful things.

COURTLAND J. YEARSLEY, APPELLEE, V. A. C. INGRAM ET AL., APPELLANTS.

FILED JUNE 18, 1915. No. 18197.

1. **Appeal**: CONFLICTING EVIDENCE. The determination by the jury of controverted questions of fact, properly submitted on conflicting evidence, will not be disturbed on appeal unless clearly wrong.
2. **Bills and Notes**: PAYMENT: INSTRUCTIONS. The trial court instructed the jury that, if they should find from the evidence that the live stock was taken by the plaintiff in full payment and satisfaction of the note, they should find for the defendants. *Held*, that the instruction properly submitted the question of defendants' theory of his defense to the jury.

APPEAL from the district court for Red Willow county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Ritchie & Wolff, for appellants.

Livingston & Heinke, C. E. Eldred and *S. R. Smith, contra.*

BARNES, J.

This was an action to recover the balance due plaintiff on a promissory note, dated August 26, 1910, given by defendants Ingram and Shafer for the rent of a farm consisting of two sections of land in Red Willow county. The note was signed by defendant Porter as a surety. The petition was in the usual form, and gave the defendants credit for $710, which was duly indorsed on the note. The prayer of the petition was for a judgment of $1,090, with interest. The defendants, by their answers, admitted the execution of the note in question, but its delivery was not admitted. The remainder of the answers are exceedingly voluminous, and will not be set forth in this opinion. It is sufficient to say that they alleged, in substance, that, in order to induce the defendants Ingram and Shafer to lease the farm and execute the note, plaintiff represented to the defendant Ingram that the farm was composed of good black soil,

was productive, and one of the best farms in the county; that there were three wells on the farm, which produced an abundance of water sufficient to properly water 400 head of cattle; that there were 150 acres in corn, which would produce 3,000 bushels, and that the wheat land on the farm had produced 15 bushels an acre; that they well knew the representations were false and untrue, and that Ingram and Shafer believed the same and relied upon them. It was further alleged that the farm did not produce any corn for the year defendants rented it; that the wheat yield was only about two bushels an acre; and that the wells did not produce sufficient water to support 400 head of cattle; that in September, 1911, defendant Ingram settled with plaintiff and left the premises and turned over to plaintiff live stock of the agreed value of $710, which was received by plaintiff in full payment and settlement of the note in suit. Plaintiff, by his reply, denied all of the allegations of the answer, and alleged that the live stock delivered to him by defendant Ingram was not taken in full payment of the note, but that the value thereof was to be indorsed thereon as part payment. On these issues the case was tried to a jury. A verdict was rendered for plaintiff for the sum of $1,100, for which sum plaintiff had judgment, and the defendants have appealed.

It is contended that the verdict is not sustained by the evidence. It appears that defendant Ingram visited the plaintiff at the farm in question on the 25th day of August, 1910, and after a cursory inspection agreed to lease it if his codefendant Shafer was satisfied. After returning to Indianola and talking with Shafer, Ingram called the plaintiff by telephone and told him to come in the next day to make the lease. Plaintiff went to Indianola on the following day, and the lease and note were executed. At the same time defendant Ingram executed and delivered to plaintiff a chattel mortgage to secure the payment of the note, and defendant Shafer procured defendant Porter to sign the note as surety. By the terms of the lease, which was introduced in evidence, defendants were to have the use of the farm from the 1st of March, 1911, to the 1st of

March, 1912. Shafer went to the farm in the latter part of November, 1910, and sowed part of the land to wheat, which he drilled in on the old wheat stubble without previous plowing. On March 1, 1911, defendant Ingram moved onto the land. No testimony was introduced tending to show what amount of corn or wheat was produced on the farm in 1910, and, so far as those representations are concerned, there was a failure of proof. No testimony was introduced as to the number of acres of corn planted by defendants in 1911, but the wheat which Shafer sowed was shown to have produced about two bushels an acre. It appears that the farm was level and the soil was of the average quality and productiveness of land in that part of the country. Defendants testified that the wells did not produce sufficient water to supply 400 head of stock, but admitted that when they were kept clean they produced sufficient water. The testimony of plaintiff's witnesses showed that the wells produced sufficient water to supply 400 head of stock when kept cleaned out, and that there was water in abundance running away from the wells during the pasturing season. None of the representations set forth in defendant's answers are found in the lease. The evidence on that question being conflicting, the verdict of the jury on that branch of the defense should not be disturbed.

As to the alleged payment of the note in full by the delivery to the plaintiff of the live stock in question, defendant Ingram testified, in substance, to the statements contained in the answer. His testimony was denied by the plaintiff, and the memorandum written by Ingram himself, by which the live stock was turned over by the plaintiff, reads as follows: "This is to certify that I have sold to C. J. Yearsly the stock under morgage for $710 (seven hundred and ten) and privelege to run in pasture this fall. A. C. Ingram. Sept. 7, 1911." The plaintiff testified that the value of the live stock which defendant Ingram turned over to him was to be indorsed on the note as part payment, and positively stated that there was never any agreement that the stock should be taken in full payment and satisfaction thereof. The indorsement on the

Hosmer was still in Holdrege and in the employ of the plaintiff, service of summons was made upon the plaintiff by delivering to Hosmer a certified copy thereof. The testimony also shows that one Daugherty was in charge of the work at Holdrege from and after the 17th day of June, and when the service was made. It is contended that for that reason the court was without jurisdiction to render the judgment, the enforcement of which the plaintiff in this action sought to enjoin. It appears from Hosmer's testimony that the summons was served upon him, but he claims to have told the sheriff to see Daugherty. The appellant insists that it was not informed by Hosmer that the suit was pending, but that was neither the fault of the sheriff nor of the Omaha Steel Construction Company. The court which rendered the judgment sought to be enjoined had jurisdiction, and the fact that the appellant claims to have had a defense to the action is not decisive of this case.

As to the second point urged, the evidence does not show an accord and satisfaction.

The record contains no reversible error, and the judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

MICHAEL MORRISSEY, APPELLEE, V. GLENN C. WHARTON, APPELLANT.

FILED JUNE 18, 1915. No. 18166.

1. **Negligence: REFUSAL TO DIRECT VERDICT.** Evidence examined, and *held* that, since different minds may reasonably draw a different conclusion as to the negligence of defendant from the facts established, it was not erroneous for the trial court to refuse to direct a verdict in his favor.

2. **Trial: REFUSAL TO STRIKE ANSWER.** It is not error to overrule a motion to strike all of an answer to a question, where a part of the answer is competent, material, relevant and responsive.

3. ———: INSTRUCTIONS. A judgment will not be reversed for the reason that a portion of an instruction is not exactly accurate, when the charge, taken as a whole, fairly submits the issues in the case to the jury.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed on condition.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

Mahoney & Kennedy, contra.

LETTON, J.

Action to recover for personal injuries. Plaintiff recovered a judgment for $5,000. Defendant appeals.

The plaintiff, a boy about 9 years of age, was engaged as a caddy on the grounds of the Omaha Country Club, adjoining the city of Omaha. There is a paved street north of the club-house running east and west, called Main street. Rosehill avenue lies to the west of the club-house, and runs at right angles to Main street. The club-house stands diagonally across the corner between these streets a short distance from the intersection. The usual entrance and exit for automobiles is from the east. Along the sides of the streets and abutting thereon back of the club-house are automobile sheds entered from the yard of the house. South of that part of the automobile shed which abuts upon Rosehill avenue is the caddy house, with a narrow paved driveway between it and the end of the automobile sheds. This leads from the back of the club-house to Rosehill avenue, and is used upon week days for delivery wagons, but on Sundays by automobiles to some extent. On Sunday, May 18, 1908, about 1 o'clock P. M., the defendant had backed his automobile out from the sheds into the yard, and, instead of passing out to the eastward, he drove to Rosehill avenue through the narrow driveway between the sheds and the caddy house. It was customary at that hour on Sunday for the caddies to be in and playing about the caddy house, yard and adjacent street, and they usually

entered the grounds through this driveway. Defendant is a member of the club, and was familiar with these conditions. A door opened into the street a few feet from the north end of the caddy house. About the time defendant was taking his machine from the shed, plaintiff, with a number of other boys, was in the caddy house. A boy named Doll, in playing, chased the plaintiff out of the west door and north along the west side of the caddy house towards the driveway. Defendant was driving out, moving at the rate of about 4 miles an hour. The boy, Doll, who is about 15 years old, testified that plaintiff had just entered the driveway when he was struck by defendant's automobile; that the front wheel ran over him; that he pulled him out, and the back wheels went over the spot that he pulled him from; that the automobile passed along the street as far as the other side; and that no horn had been sounded or was being sounded when the accident occurred. On cross-examination he testified that he did not see the machine until it struck plaintiff, and that there is just about room enough for one to stand in the driveway when an automobile goes through; it being 10 or 12 feet wide. It is clearly shown by other testimony that the automobile was stopped when the boy was drawn out, and immediately started again by defendant, who rushed for a doctor, while the boy was cared for by bystanders. There is practically no dispute as to the facts, except as to the sounding of a warning signal.

A motion was made at the close of the testimony to instruct the jury to return a verdict for the defendant, which was overruled. It is asserted that this was erroneous, since there was no evidence to support the verdict. Defendant concedes the rule that, if different minds may reasonably draw different conclusions or inferences from the state of facts established by the evidence, the case must be submitted to the jury, but insists that it would be impossible for normally constituted minds to reasonably draw different conclusions. We are unable to take this view. The evidence of defendant's witnesses is to the effect that, after he backed his machine out from under the shed and was

just about starting it forward through the driveway, he sounded his horn once or twice, but gave no further signal. The testimony varies as to where the machine was at this time. Defendant testified that he sounded it about the corner of the shed, while another witness testified it was sounded at a distance of 20 to 30 feet from the gate, and another that it was just as he was starting forward. On the other hand, the boy, Doll, testified that no horn was sounded, and that he could have heard it if it had been sounded. The probability of this boy hearing the horn if sounded seems doubtful, since he was either in the caddy house, or running after the other boy, with the caddy house between him and the automobile, and his attention probably absorbed by the chase when the other witnesses say defendant sounded it. The weight of this evidence was for the jury. Even without considering his evidence as of any force, we think it was still a question for the jury to determine, considering the facts that it was an hour when from 30 to 50 boys might be expected to be playing around these buildings and in the street, that the door of the caddy house opened to the west close to the corner, from whence boys might be expected heedlessly to emerge at any moment, and considering the narrowness of the driveway, whether, under all the circumstances, the defendant exercised due care in merely signaling when he started, and not continuing to sound his horn until he passed the corner of the caddy house. The question whether the defendant exercised due care in giving warning is one upon which reasonable minds might differ, and the motion to instruct was properly overruled.

It is said the evidence will not support a verdict, for the reason that the defendant and three other witnesses testified that the automobile was moving slowly, and that as it came out the plaintiff, running very fast, came to the corner of the caddy house, tried to stop himself, and slid under the wheels. But the question as to the lack of care with respect to giving of a signal remains, and the fact, if conceded, that the boy tried to stop and slid under the wheel, is not material, unless this had concurred with

the exercise of due care by the defendant in giving a sufficient signal of his approach.

Error is assigned on account of the refusal of the court to sustain objections to certain questions put to medical witnesses, and in refusing to strike certain answers to such questions. The principal question which was answered requested the doctor to state "the results which, with a reasonable degree of certainty, might follow from a fracture" such as the plaintiff sustained. This does not ask for a mere conjecture, as defendant asserts. The doctor answered, in part, that such an injury "would leave a certain amount * * * of scar tissue, abnormal cells," and that such a location would be more susceptible to bad effects as a result of some diseases, such as typhoid, than a healthy bone would be; that such an injury is sometimes followed by the development of malignant diseases, such as sarcoma.

A motion to strike the answer was overruled. Part of the answer was strictly competent, relevant, and responsive to the question. It was not erroneous, therefore, to refuse to strike it all. *Brown v. Chicago, B. & Q. R. Co.*, 88 Neb. 604. On cross-examination the doctor stated that, in order for any of these conditions to develop, the diseases themselves would have to occur; that he could not tell in advance that the injury would cause sarcoma; and that he would say it had not happened in the majority of cases. Taking all the testimony together, we think no prejudice occurred.

Complaint is made as to certain instructions, but, considering the charge as a whole, we think the issues were fairly submitted to the jury.

It is complained that the verdict is excessive. The plaintiff was 9 years old at the time of the accident. He received a slight fracture of the left leg, which seems to have made a complete union. He suffered considerable pain, had the leg placed in a plaster cast for about six weeks, and was on crutches a little longer. He was very nervous after the accident, and to some extent to the time of the trial, and has not made as good progress in school

afterwards as before. It is not shown that any permanent injury will result, except such as is the usual accompaniment of a broken bone in boyhood.

We are of the opinion that the recovery is excessive, and that the verdict should be set aside for that reason, unless the plaintiff remit the sum of $2,500 within 40 days, in which event the judgment of the district court will be

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

MATTHEW J. CLARKE, APPELLEE, V. NEMAHA VALLEY DRAINAGE DISTRICT NO. 2, APPELLANT.

FILED JUNE 18, 1915. No. 18192.

Eminent Domain: CONDEMNATION PROCEEDINGS: APPEAL: EVIDENCE. In an appeal to the district court from an award made by appraisers under condemnation proceedings, tried without pleadings and upon the transcript from the county court, matters which the appraisers could not have properly considered to enhance the amount of the award are not proper to be given in evidence or considered by the jury.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed on condition.*

Kelligar & Ferneau, for appellant.

C. F. Reavis and *Neal & Armstrong, contra.*

LETTON, J.

Appraisers were appointed under *ad quod damnum* proceedings prosecuted for the appellant drainage district to appraise damages to the land of appellee. An appeal was taken from their award to the district court. Pleadings were filed in that court, which were afterwards withdrawn, and the case tried to a jury upon the transcript from the county court.

During the trial, after testifying to the quantity of land taken and its reasonable value, the appellee was asked: "I will ask you to state what, if any, assessment you have paid to the defendant upon your land in sections 9 and 4." This question was objected to as incompetent, not a proper measure of damages, not a matter at issue in the case, and not within the pleadings. The objection was overruled. Other evidence was admitted over objection along the same line. The court instructed the jury that, in addition to the fair market value of the land taken the plaintiff was entitled to recover the assessment paid by him on the land so taken. The jury returned a general verdict and special findings. The special findings set forth the amount of the land taken, and the value per acre, and also that "we allow said plaintiff $96.38 as special tax paid by him on sections 9 and 4, and $21.37 as special tax paid by him on section 30, * * * and $32.76 as special tax paid by said plaintiff on section 31."

The appellant complains that the amount of special taxes paid is not within the issues in this proceeding, nor a part of the true measure of damages; that the only matters which can be considered in the district court on appeal from the award of a board of appraisers are those which the board of appraisers are entitled to consider, and those alone. This question has already been settled in this court. In *Burlington & M. R. R. Co. v. Schluntz,* 14 Neb. 421, it is said: "The appeal brought to the district court, for decision by a jury, precisely the same questions that were covered by the award, and none other. Matters which the commissioners could not properly have considered to enhance the amount of their award were not proper to be given to the jury to affect their verdict." In *Gerrard v. Omaha, N. & B. H. R. Co.,* 14 Neb. 270, and in *Trester v. Missouri P. R. Co.,* 33 Neb. 172, it is held that, on an appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings.

Both parties concede that, in case the appellant's contention is sustained, it will be unnecessary to set aside the judgment to its full extent.

The judgment of the district court is reversed, unless appellee file a remittitur of the amount found due for special taxes paid within 40 days, in which case the judgment will be

AFFIRMED.

HAMER, J., not sitting.

NICHOLAS A. SHUE, APPELLEE, V. VILLAGE OF SILVER CREEK, APPELLANT.

FILED JUNE 18, 1915. No. 18211.

Intoxicating Liquors: OCCUPATION TAX: RECOVERY. The provisions of sections 6491, 6492, 6493, Rev. St. 1913, apply to a tax upon occupations levied by a village council for revenue purposes, and, in order to recover *pro tanto* money paid as an occupation tax for selling liquor at retail, the statutory means must be pursued.

APPEAL from the district court for Merrick county: GEORGE H. THOMAS, JUDGE. *Reversed and dismissed.*

Elmer E. Ross, for appellant.

D. F. Davis and *Reeder & Lightner, contra.*

LETTON, J.

Action to recover part of an occupation tax paid to the village by the plaintiff as a liquor-dealer. This is a companion case to *Shue v. School District, ante,* p. 455. The facts as to the application for license, its issuance and cancelation are set forth in the opinion in that case, and the reasons given in that opinion for holding the applicants not so culpable as to preclude the right to recover license money *pro tanto* are adopted here.

Plaintiff paid the treasurer of the village $510 on June 24, 1911, as an occupation tax for the remainder of the

municipal year. He sues in this action to recover "the unearned portion of the occupation tax." Most of the material facts alleged in the petition are admitted.

The answer denies that the annual occupation tax required was $600, and alleges by way of *cross-petition* that the ordinance required an occupation tax of $700, for which plaintiff became indebted to the village on engaging in the business; that he has paid $510; and that the remainder of the sum is still due, for which it prays judgment. It is stipulated that at the time the occupation tax was paid the ordinance then in force required a retail liquor-dealer to pay an annual tax of $700, payable by the year; that on May 16, 1911, an ordinance reducing the occupation tax to $600 a year was passed, but through an invalidity in the record never became effective; that $510 was paid by plaintiff and accepted by defendant in the belief that the latter ordinance was in full force and effect. The court found for the plaintiff in the sum of $154.50, and rendered judgment accordingly. The village has appealed.

The right to recover money paid to a school district for a license improperly issued is settled in this state, but whether recovery can be had for the proportionate part of the occupation tax paid is an open question. It was not decided in *City of Auburn v. Mayer*, 58 Neb. 161, as plaintiff claims. In that opinion it is said that the ordinance imposing the occupation tax was "of such a character as to make applicable whatever may be determined as to the license."

Defendant argues that the money received from an occupation tax is not of the same nature or subject to the same conditions as that derived from a license; that the taxing power is the sole authority for occupation taxes, while license moneys are collected under the police power. This is settled by the following decisions. *Village of Dodge v. Guidinger*, 87 Neb. 349; *State v. Boyd*, 63 Neb. 829; *Rosenbloom v. State*, 64 Neb. 342; *Norris v. City of Lincoln*, 93 Neb. 658. It is the general rule that, where the ordinance authorizing the levy of a fixed amount as an occupation tax makes no provision for other than annual pay-

ments covering the tax for the whole municipal year, a person who begins business at any portion of the year is liable for the full amount of the tax. The ordinance in evidence imposes taxes upon certain occupations payable by the day, week or month. There is no authority to collect less than the full amount of the tax fixed for the period which it is designed to cover. Plaintiff paid the occupation tax voluntarily with the intention of carrying on the business of liquor selling. Cases cited in note to *Eslow v. City of Albion* (153 Mich. 720), 22 L. R. A. n. s. 872.

The fact that a person is selling liquor in contravention of law does not affect his liability to a business or occupation tax. *Youngblood v. Sexton,* 32 Mich. 406. The familiar fact that persons convicted of selling liquor without a license are very commonly found in the possession of a receipt showing the payment of United States revenue taxes illustrates this proposition. *State v. Funk,* 27 Minn. 318. While another statute would have been violated if he had sold without a license, he was subject to this tax as soon as he engaged in the occupation with or without license. He took the risk when he paid the tax. Our attention has not been called to any other provision for the refunding of taxes than those contained in sections 6491, 6492, 6493, Rev. St. 1913, and it is held in *Caldwell v. City of Lincoln,* 19 Neb. 569, that such provisions apply to occupation taxes. Section 6493 makes members of a village council liable upon their bonds if they discharge, release, remit or commute any taxes other than in the manner provided. While in the matter of right and justice there seems little room to distinguish between the two exactions, this court has already, in holding that a portion of the license fee may be recovered, held contrary to the weight of authority, though its decision has been approved and followed in a few states. We are reluctant to go further unless plainly permitted so to do by the statutes, or at least not prohibited by previous construction.

We are of opinion that the village board properly refused to pay the claim.

A majority of the court (which majority does not include the writer) are of the opinion that the plaintiff is not liable for the uncollected portion of the tax.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

HAMER, J., not sitting.

CHARLES M. SOKOL, APPELLEE, V. VILLAGE OF SILVER CREEK, APPELLANT.

FILED JUNE 18, 1915. No. 18212.

APPEAL from the district court for Merrick county: GEORGE H. THOMAS, JUDGE. *Reversed and dismissed.*

Elmer E. Ross, for appellant.

D. F. Davis and *Reeder & Lightner, contra.*

LETTON, J.

This action is based upon substantially the same state of facts as *Shue v. Village of Silver Creek, ante,* p. 551; the only difference being that the reasons assigned for revoking this license of plaintiff are those set forth in *In re Sokol,* 90 Neb. 290.

For the reasons assigned in the opinion in that case, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

HAMER, J., not sitting.

JOHN MOLL, APPELLANT, V. ADOLPH HAGERBAUMER ET AL., APPELLEES.

FILED JUNE 18, 1915. No. 17938.

1. **Easements: NOTICE TO PURCHASER.** "One who purchases land burdened with an open and visible easement is ordinarily charged with notice that he is purchasing a servient estate." *Arterburn v. Beard*, 86 Neb. 733.
2. ———: **PRIVATE WAY: ADVERSE USER.** Temporary deviations from a well-defined track to avoid pools or mud do not necessarily affect an easement by adverse user, where the travel has followed substantially the same course for more than the statutory period of ten years.
3. ———: ———: **CONSTRUCTION OF GATE.** The construction of a gate at the entrance to a private way may be consistent with an easement, where the use of the way has not been thereby interrupted.
4. ———: ———: **ADVERSE USER: CLAIM OF RIGHT: PRESUMPTION.** Where a landowner has openly, notoriously and continuously used a private way across the land of another for more than the statutory period of ten years, it will be presumed that he did so under a claim of right, and the burden of proving the contrary rests on the owner of the servient estate.

OPINION on motion for rehearing of case reported in 97 Neb. 809. *Former judgment of affirmance vacated, and judgment of district court reversed with directions.*

ROSE, J.

Plaintiff prays for an injunction to prevent defendants from interfering with his use of a private way to a tract of land owned by him in Dodge county, alleging that the road crosses lands of defendants and affords his only means of ingress to and egress from his premises; that he and his predecessors in interest used the way continuously for more than 40 years, and thus acquired by prescription the right to do so; that defendants purchased the servient estate March 2, 1891, with notice of plaintiff's easement, and never questioned his right to exercise it until they

recently obstructed his private way by a fence. The facts on which plaintiff bases his prescriptive right are put in issue by a general denial. Upon a trial of the case the district court found, in substance, that the way in controversy had been the only means of ingress to and egress from plaintiff's premises for more than 40 years; that plaintiff is the owner of any roadway rights possessed by those through whom he acquired title to his land; that defendants closed the way and excluded plaintiff therefrom; that plaintiff used the way with the consent of defendants, and that he had a license to do so, but no easement. From a dismissal of the suit, plaintiff appealed. A hearing here resulted in an affirmance of the judgment on the ground that plaintiff's use of the land of defendants was permissive only. *Moll v. Hagerbaumer,* 97 Neb. 809. Later a rehearing was granted, and the case has been reargued.

If plaintiff had an easement, it was open and visible to defendants when they purchased the servient estate. They were, therefore, chargeable with notice of plaintiff's roadway right, if any. *Arterburn v. Beard,* 86 Neb. 733.

The question for re-examination is the character of plaintiff's use of the private way. Was it permissive merely, under a license revocable at the pleasure of defendants? The answer must be found in the evidence. There is uncontradicted proof that the way to plaintiff's land was traveled as early as 1863. A number of witnesses testified that it had been in existence with a well-defined track for more than 40 years, and that the main travel had taken the same course during all of that time. There is evidence tending to show that travel at times had been diverted from the established way, by dampness or water, but it is clear from the proof relating to this subject that plaintiff's prescriptive rights, if any, were not affected by temporary diversions to avoid pools or mud. *Kendall-Smith Co. v. Lancaster County,* 84 Neb. 654. Plaintiff and his grantors had used the way without interruption or dispute for more than the statutory period of ten years before defendants purchased the servient estate. Defendant Adolph Hager-

baumer himself stated on the witness-stand that he had never interfered with nor questioned plaintiff's use of the way until he obstructed it by the fence of which complaint is made in the petition. For more than 30 years there had been a gate across the road, but it had never been used to interfere with plaintiff in going to and from his land. He claims a private way only, and the gate was intended to protect the rights of defendants, plaintiff and their grantors from the encroachment or trespass of others. The use of a gate for that purpose is consistent with a private easement and does not weaken the claim to such an estate. *Demuth v. Amweg,* 90 Pa. St. 181; *Johnson v. Stayton,* 5 Har. (Del.) 448. Plaintiff said he had never asked permission, but had used the way continuously without interruption as a matter of right. There is nothing in the record to show when or on what terms the user of plaintiff's grantors originated. There being uncontradicted proof that the way was continuously used by plaintiff and his grantors for more than 40 years, the burden was on defendants, who deprived plaintiff of his means of ingress to and egress from his premises, to show that the use was permissive and not under a claim or right. *Majerus v. Barton,* 92 Neb. 685. On this issue the evidence will not justify a finding in favor of defendants. In their behalf a number of witnesses who had hauled wood or sand across the premises of defendants testified to the conclusion that their use of the road had been "permissive." Facts showing a license for this purpose, as distinguished from adverse user, are not stated. Their testimony does not indicate that they understood the legal significance of the word "permissive" as differing from the popular sense in which it is used. Besides, if they correctly stated conclusions of law, their testimony was consistent with prescriptive rights of plaintiff, since the way is a private one, from which the public generally may be excluded. Defendant Adolph Hagerbaumer testified that Gaylord, his grantor, when selling the land crossed by the private way, said, referring to plaintiff's land:

"You can have that land down there for pasture if you want to, but you have to allow those fellows to have a road to haul their wood out during winter, but you can stop up that road any time you want to; but, if you want to allow them to have the road, then you can have that land down there that they own for pasture for your cattle."

Testimony of this character, if competent, a question not decided, is contradicted by proof more convincing. Defendants afterwards paid plaintiff for pasture without attempting to close the road which led to it. Plaintiff's easement had already been established. The closing of the private way evidently grew out of controversies over pasturage, and sand, and resulted in the illegal act of which plaintiff complains. Defendants have not established a defense, and an injunction protecting plaintiff in his right to the use of a private roadway eight feet wide along the beaten track to his land as described in plaintiff's pleadings and proof should have been granted.

The former decision by this court herein and the judgment below are therefore reversed, and the cause is remanded to the district court, with directions to enter a decree conforming to the prayer of plaintiff's petition.

REVERSED.

HAMER, J., not sitting.

CORA L. BISHOP, APPELLANT, V. LINCOLN BASEBALL CLUB, APPELLEE.

FILED JUNE 18, 1915. No. 18149.

1. **Justice of the Peace: APPEAL: TIME TO FILE BOND.** The statutory period of ten days for filing an appeal bond in a case tried before a justice of the peace does not begin to run until the judgment is entered on the docket.

2. **Appeal: SECONDARY EVIDENCE.** In a jury trial in the district court, the sufficiency of the foundation for secondary evidence of the contents of a ledger is a question for the presiding judge, and his ruling will not be reversed on appeal unless an abuse of discretion is affirmatively shown.

APPEAL from the district court for Lancaster county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

John S. Bishop, for appellant.

Strode & Beghtol and *F. M. Tyrrell, contra.*

ROSE, J.

This is a statutory proceeding against a garnishee to recover $48.55, the amount of an unpaid judgment, liability of defendant being based on the plea that the answer in garnishment is unsatisfactory. Rev. St. 1913, sec. 8385. The original suit was commenced before a justice of the peace. Plaintiff, on a claim for room rent, recovered a judgment against Wilkie Clark, a ball player, for $18 and costs. He appealed to the district court, where plaintiff again prevailed. The justice of the peace, however, had garnished the Lincoln Baseball Club, the employer of Clark, and the garnishee in its answer denied that it was indebted to him. The present action was instituted before a justice of the peace to recover from the garnishee the amount of its employee's indebtedness to plaintiff, on the ground that its answer is false. Plaintiff herein recovered judgment for the full amount of her claim, and defendant appealed to the district court. At the close of plaintiff's testimony, the district court directed a verdict in favor of defendant, and plaintiff has appealed to this court.

Two questions are presented, and it is first argued that the district court erred in overruling a motion by plaintiff to dismiss the appeal on the ground that the appeal bond was not filed within the statutory period of ten days from the rendition of the judgment. Rev. St. 1913, sec. 8452. The determination of this question depends on the date of the "rendition of the judgment" for the purpose of filing an appeal bond. On an envelope containing the papers in the case of the justice of the peace, after the trial before him, made the following note:

"June 25th,. 1912.

"Judgment is hereby entered in the above entitled case in favor of Cora L. Bishop and against the Lincoln Base-

ball Club, a corporation, for the sum of $48.55 and costs of suit."

Afterward, the justice of the peace changed the figure "5" in the date line to "8," thus making it read "June 28, 1912." Judgment was entered on the docket of the justice of the peace June 28, 1912, but he subsequently sustained a motion by plaintiff to change the date of that entry to June 25, 1912. The appeal bond was filed within 10 days from June 28, 1912, and the district court refused to dismiss the appeal. Is the ruling correct? A justice of the peace is required to keep a public record in what is known as "the docket," but the statute makes no provision for entries on an envelope. The docket must contain, among other enumerated things, "the judgment of the justice, specifying the items of cost included, and the time when rendered." Rev. St. 1913, sec. 8532, subd. 10. The docket entry must be made at the time the judgment is rendered. Rev. St. 1913, sec. 8533. Judgments enforcing rights and authorizing the seizure of the property of litigants are not left to the uncertain memory of judicial officers or to memoranda prepared by them on loose papers. The constitutional right of appeal does not depend on changed dates inserted by justices of the peace in unofficial documents. The law does not recognize as a judicial record the unofficial minutes of a justice of the peace. *Beuerlein v. Hodges*, 10 N. Y. Supp. 505. According to statute, an appeal from a judgment of the district court must be commenced within six months "after the rendition of the judgment." Rev. St. 1913, sec. 8203. That provision was construed in *Bickel v. Dutcher*, 35 Neb. 761, overruling *Horn v. Miller*, 20 Neb. 98; the rule announced being: "The time within which an appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals, by filing in this court a certified transcript of the proceedings of the district court." In the opinion it was said: "But that the judgment must be made a matter of record in order to limit

the time for appeal is a proposition well sustained by authority."

By analogy, the time for filing an appeal bond in an action before a justice of the peace does not begin to run until the judgment is entered on the docket, the statute requiring such a bond to be filed within ten days "from the rendition of the judgment." Rev. St. 1913, sec. 8452. It follows that the trial court did not err in overruling the motion to dismiss the appeal.

The other proposition argued by plaintiff is assigned error in the refusal of the trial court to permit her to adduce secondary evidence showing the contents of the ledger account between defendant and Clark at the time of the garnishment. The account was in evidence before the justice of the peace, and the attorney for plaintiff testified that defendant's counsel took the ledger away. The latter, however, said it was left with the justice of the peace. Though plaintiff's attorney, prior to the trial before the justice of the peace, demanded an inspection of the ledger and obtained a copy of Clark's account, he did not serve on defendant a notice to produce the book in any court, but relied upon opposing counsel to produce it in the district court. While a subpœna *duces tecum* was served on the defendant's secretary, the record was not in his possession, and he said he was unable to find it in his office. As stated, there was proof that the ledger had been left with the justice of the peace, but he was not called as a witness. In searching for a missing record and in accounting for its loss, diligence is required to make secondary evidence available. *Samuelson v. Gale Mfg. Co.*, 1 Neb. (Unof.) 815; *Dempster Mill Mfg. Co. v. First Nat. Bank*, 49 Neb. 321. The last custodian should be produced as a witness. Jones, Evidence (2d ed.) sec. 213; *Myers v. Bealer*, 30 Neb. 280. The sufficiency of the foundation for secondary evidence is addressed to the discretion of the trial judge. *Hapgood Plow Co. v. Martin*, 16 Neb. 27; *Bradstreet v. Grand Island Banking Co.*, 89 Neb. 590. In the present case an abuse of discretion in rejecting sec-

ondary evidence of the contents of the ledger is not affirmatively shown.

AFFIRMED.

MORRISSEY, C. J., and HAMER, J., not sitting.

INTERSTATE RUBBER COMPANY, APPELLEE, V. ISAAC KAUFMAN ET AL.; CHRIS ASMUSSEN, GARNISHEE, APPELLANT.

FILED JUNE 18, 1915. No. 18225.

Garnishment: PURCHASER OF MERCHANDISE IN BULK. The purchaser of a stock of merchandise transferred to him in violation of the Bulk Sales Law holds the property as trustee for the seller's creditors, and his liability in that capacity may be enforced by garnishment, though he has paid the purchase price and has resold the stock. Rev. St. 1913, sec. 2651.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. C. Robinson, for appellant.

H. E. Burkett and *Walter S. Stillman, contra.*

ROSE, J.

This is an action on a promissory note for $230. It was given for goods sold and delivered to the makers, Isaac Kaufman and Lizzie Kaufman. They made no defense. Plaintiff is payee. Chris Asmussen was summoned as garnishee. His answer shows that he purchased from the Kaufmans a stock of merchandise for $10,000. Notice of the sale was not given to creditors of the Kaufmans in compliance with the Bulk Sales Law. Rev. St. 1913, sec. 2651. Before the writ of garnishment was served, the garnishee had paid the purchase price and had resold the stock. At the time of the sale to the garnishee, plaintiff was a creditor of the Kaufmans, and the note in suit was given for the amount of their indebtedness. Upon a hearing in the proceeding in garnishment, judgment

was rendered against Asmussen, the garnishee, for the full amount of plaintiff's claim, and he has appealed to this court.

The statute provides: "The sale, trade or other disposition in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, * * * unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address" are stated in the sworn list to be demanded of the seller. Rev. St. 1913, sec. 2651.

On appeal the position of the garnishee may be summarized as follows: Garnishment is not the proper remedy. The rights of an attaching creditor, as against the garnishee, are not superior to those of the debtor. A garnishee is not liable as defendant's debtor, unless it affirmatively appears that, at the time of the garnishment, a cause of action existed against the former in favor of the defendant for the recovery of a legal debt. The argument, as thus outlined, is not without support in adjudicated cases.

In *McIntosh & Warren v. Owosso Carriage & Sleigh Co.*, 146 S. W. (Tex. Civ. App.) 239, it was held: "Where the purchaser of the entire stock of an insolvent debtor paid full value for the goods without fraud in making the purchase, and had none of such goods in his possession when he was garnisheed by a creditor of the seller, judgment could not be rendered against him for the proceeds of the goods sold as a trustee for the benefit of creditors." After a review of cases the Texas court said: "A purchaser of goods from an insolvent debtor may in fact, hinder, delay and defraud his creditors, though full value be paid, for the reason that money in the pocket of the debtor is beyond the reach of the law. In such case if the purchaser knew, or is chargeable with notice of such fraudulent intent by fiction of the statute of frauds, the wisdom

of which has met with approval since its passage in 13 Elizabeth, the title, as to creditors, remains in the fraudulent creditor, and such goods may be seized under execution or attachment, or a lien may be fixed upon them by garnishment while they remain in the hands of the fraudulent purchaser. But there is no statute in this state which gives a creditor any title to the proceeds of such goods. To say that the purchaser who, in good faith, has paid full value for such goods, without any intent to defraud, though such purchase be a constructive fraud by virtue of some such statute as the Bulk Sales Law, holds the proceeds of such goods in trust for creditors, would indeed be a fiction of law, and one that we are not prepared to announce. The purchaser who pays full value for goods does not in fact hold them in trust for the seller, nor for his creditors, but for himself and against everybody. That he is estopped to set up such claim where he has participated in the fraudulent intent of the seller is by force of the statute, and where the statute halts the courts must halt."

The weight of authority, however, and the views previously announced by this court are to the contrary. In *Appel Mercantile Co. v. Barker,* 92 Neb. 669, it was held: "One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, in violation of the statute, will be held to be a trustee for the benefit of the creditors of his vendor, and liable as garnishee." In that case the purchaser had disposed of the stock of merchandise, but still held title to land exchanged for the goods. For this reason, it is insisted that the decision does not control the present case, but the opinion cites and follows *Kohn v. Fishbach,* 36 Wash. 69, 104 Am. St. Rep. 941, wherein the following language is used: "It is true, the garnishee answered * * * that he did not at that time have any of the property of the defendant in his possession, and that he was not indebted to him. But, in contemplation of law, he had the property of the defendant in his hands, because, having purchased the property in fraud of law, without complying with the provisions of the law in

relation to sales of property in bulk, he stood in the position of a trustee of the property, responsible to the *cestui que trust* or the creditors for the disposition of such property."

Under facts identical with the present case, it was said in *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1: "As a general rule, a garnishee's liability to a creditor of the principal defendant is conditioned upon his liability to such defendant—in other words, a creditor cannot reach by garnishment any assets which his debtor could not recover from the garnishee. *Tim & Co. v. Franklin*, 87 Ga. 93. This rule is subject, however, to an exception, where the garnishee is in possession of effects of the defendant under a transfer fraudulent as to his creditors. In such a case, though the defendant can maintain no action against the garnishee, yet a creditor of the defendant may subject the effects in the garnishee's hands by garnishment. * * * What is the liability of a garnishee, who held goods of the defendant under a transfer void as to creditors of the latter, but who sold them prior to the service of the summons of garnishment? * * * We are of opinion that the purpose of the statute regulating sales of goods, wares and merchandise in bulk was to constitute such goods, etc., sold in bulk without complying with the provisions of the statute, trust property in the hands of the purchaser for the benefit of the creditors of the seller."

The correct rule seems to be: The purchaser of a stock of merchandise transferred to him in violation of the Bulk Sales Law holds the property as trustee for the seller's creditors, and his liability in that capacity may be enforced by garnishment, though he has paid the purchase price and has resold the stock. *Appel Mercantile Co. v. Barker*, 92 Neb. 669; *Scheve v. Vanderkolk*, 97 Neb. 204; *Musselman Grocer Co. v. Kidd, Dater & Price Co.*, 151 Mich. 478; *Marquette County Savings Bank v. Koivisto*, 162 Mich. 554.

It was suggested in argument, as a reason for reversing the judgment against garnishee, that he bought the goods

in bulk before the note was executed; but the point is not well taken, because the record shows without dispute that the debt evidenced by the note was incurred before garnishee made his purchase.

Garnishee also complains that plaintiff waited too long before asserting any right under the statute. This defense, however, is not established by the record.

AFFIRMED.

HAMER, J., not sitting.

STATE, EX REL. MISSOURI PACIFIC RAILWAY COMPANY, RELATOR, V. HENRY T. CLARKE, JR., ET AL., RESPONDENTS.

FILED JUNE 19, 1915. No. 18975.

1. **Carriers: RATES: POWER OF STATE RAILWAY COMMISSION.** The constitutional amendment creating the state railway commission did not grant to that body exclusive power to fix rates for the transportation of freight and passengers. Const., art. V, sec. 19*a*.
2. ———: ———: ———. Under the constitutional amendment creating the state railway commission, it may fix rates only in the absence of specific legislation. Const., art. V, sec. 19*a*.
3. **Statutes** *in pari materia* must be construed together.
4. **Carriers: PASSENGER RATES: POWER OF STATE RAILWAY COMMISSION.** The power conferred in general terms upon the state railway commission by the constitution and the state railway commission act does not authorize it to increase the maximum passenger rate of two cents a mile as fixed by the legislature in 1907. Const., art. V, sec. 19*a*; Rev. St. 1913, secs. 6067, 6107, 6109.
5. **Statutes: CONSTRUCTION.** A particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the later act to operate only outside of the scope of the former.

ORIGINAL proceeding in mandamus to compel respondents to entertain relator's application for increase of passenger rates. *Writ denied.*

E. J. White, B. P. Waggener and *J. A. C. Kennedy,* for relator.

Grant G. Martin, Attorney General, and *W. T. Thompson, contra.*

E. P. Holmes, amicus curiæ.

ROSE, J.

This is an original application for a peremptory writ of mandamus directing the members of the state railway commission to pass on the merits of a petition by relator for an increase in existing railroad rates for the transportation of passengers. Respondents dismissed relator's petition. They resist the writ of mandamus because they are of the opinion that they have no power to increase passenger rates beyond the limits fixed by the following legislative enactment: "It shall be unlawful for any railroad corporation operating, or which shall hereafter operate, a railroad in this state to charge, collect, demand or receive for the transportation of any passenger over twelve years of age, with baggage not exceeding two hundred pounds in weight, on any train over its line of road in the state of Nebraska, a sum exceeding two cents per mile: Provided, no railroad company shall be required to sell any ticket for less than five cents." Rev. St. 1913, sec. 6067.

It is insisted that the constitutional amendment creating the state railway commission confers upon it power to change rates fixed by the legislature. The amendment declares: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." Const., art. V, sec 19*a*.

Relator argues that the words, "as the legislature may provide by law," modify only the expression, "general control of common carriers," thus excluding "regulation of rates" from the modifying clause. That interpretation is

not warranted by the language construed. "As the legislature may provide by law" applies to the entire grant of power, including "regulation of rates." This is shown also by the concluding provision: "But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." The amendment did not grant to the state railway commission exclusive power to fix rates. Before the amendment was adopted the constitution declared: "And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state." Const., art. XI, sec. 4. This provision is still a part of the supreme law. The fixing of rates, therefore, is still within the legislative power. It is in the absence of specific legislation that the state railway commission may exercise such authority. It follows that, since passenger rates were fixed by statute, authority of the state railway commission to increase them must be found in legislative action.

Relator further insists that power to increase passenger rates has been delegated to the state railway commission by the legislature. Following the adoption of the constitutional amendment at the general election in 1906, the legislature of 1907 passed an act defining the powers and the duties of the state railway commission. This became a law March 27, 1907, and to it relator points for authority to increase passenger rates. It contains the following provisions:

"The commission shall have the power to regulate the rates and services of, and to exercise a general control over all railroads, express companies, car companies, sleeping car companies, freight and freight line companies, and all other common carriers engaged in the transportation of freight or passengers within the state." Rev. St. 1913, sec. 6107.

"The commission shall have the power, and it shall be its duty to make all necessary classifications and to fix all necessary rates, charges and regulations to govern and

regulate the freight and passenger tariffs of railway companies and common carriers, the power to correct abuses and prevent unjust discriminations, extortions and overcharges in rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as hereinafter provided, through proper courts having jurisdiction." Rev. St. 1913, sec. 6109.

At the same session the legislature enacted another law known as the "Anti-pass Act." Separate acts reducing express charges and freight rates were also passed. The import of statutes relating to rates and to the powers and the duties of the state railway commission is determined from all the laws on the subject, including constitutional provisions. Referring to the "Railway Commission Act," the "Anti-pass Act" (Laws 1907, ch. 93), and the "Two-cent Fare Act" (Laws 1907, ch. 92), it was said in *State v. Union P. R. Co.*, 87 Neb. 29: "These provisions of the statutes, though forming parts of separate acts, enacted at different times, treat of the same subject matter. They form stages in the progressive development of legislation seeking to correct abuses which formerly existed. They carry out specifically the mandate to the legislature given by section 7, art. XI of the Constitution, that 'the legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this state and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises.' They are, therefore, *in pari materia*, and must be construed together."

The provisions quoted from the "Railway Commission Act" went into effect 21 days later than the "Two-cent Fare Act." Do they authorize the state railway commission to increase passenger rates? The answer to this question must be found in the intention of the legislature as disclosed by all of the legislation on the subject, when viewed in the light of the constitution and the conditions requiring improvement. The power of the legislature to

fix rates or to delegate to the state railway commission authority to increase rates already fixed by statute cannot be questioned. After passing the act defining the powers and duties of the state railway commission, the legislature at the same session enacted laws decreasing existing express and freight rates. Laws 1907, chs. 91, 95. In each instance power to change the rates thus fixed was conferred in specific terms on the state railway commission. In the "Two-cent Fare Act" authority to increase passenger rates was not granted, nor is it to be found in specific terms in any subsequent enactment, though the statute prescribes penalties for violating its provisions. Rev. St. 1913, sec. 6071. The intention to withhold from the state railway commission authority to increase passenger rates is fairly disclosed by the legislation specifically authorizing it to increase express and freight rates, though they had been fixed by statute; by the fixing of passenger rates without thus authorizing an increase; by the failure of the legislature to specifically amend the "Two-cent Fare Act," while legislating generally at the same session on the subject of rates; by the conditions which prompted the lawmakers to remedy existing abuses; and by the constitutional provisions conferring the rate-making power on the legislature and creating the state railway commission.

Legislation requiring railway companies to sell for $20 a book of tickets good for 1,000 miles also indicates a legislative intention to withhold from the state railway commission authority to increase passenger rates beyond two cents a mile. After the passage of the act conferring on the state railway commission in general terms power to fix passenger rates, railway companies were required to sell passenger transportation at the rate of two cents a mile. Laws 1907, ch. 94. This act recognized the maximum rate fixed earlier in the session, and prescribed penalties for violations of its terms, but contained no provision authorizing the state railway commission to allow an increase. When the legislature convened in 1907, the maximum rate was three cents a mile. At that session, as al-

ready stated, the maximum was reduced to two cents a mile.

All of the legislation, both specific and general, relating to rates and to the powers and duties of the state railway commission may be harmonized by reasonable construction. Between the earlier and later acts there is no repugnance amounting to a repeal of the former. In the "Two-cent Fare Act" the legislature dealt with a specific subject limited to passenger rates. In the subsequent act relating to the state railway commission and conferring upon it authority over rates, the legislation is general. The specific provisions control, since they are not expressly contradicted by the general terms of the later act. The specific enactment fixes a maximum rate of two cents a mile for the transportation of passengers, leaving the question of lower rates for future determination. The general power of the state railway commission, as applied to passenger traffic, is limited to rates below the maximum fixed by the two-cent fare law. The legislature, in specifically fixing a maximum passenger rate and in conferring generally upon the state railway commission power to regulate or abolish passenger rates, left the state railway commission free to change or abolish rates within the bounds thus set by the lawmakers. This view of all of the legislation harmonizes it, gives effect to all of the acts, and makes resort to repeal by implication unnecessary. Intention, rather than expediency or legislative wisdom, is the end sought in construing and in giving effect to statutes. The principles applicable to the present inquiry were recently stated by Judge Morris of the supreme court of Indiana in the following language:

"As applied to the question of an implied repeal of an earlier by a later act of the same session, it is held that the later act, if in general terms, and not expressly contradicting the provisions of the earlier one, shall not be considered as intended to affect its more particular and specific provisions, unless absolutely necessary to hold otherwise in order to give any meaning at all to the words of the later act. * * * The reason for such rule is clear.

In passing the special act, the minds of the legislators were necessarily directed to the details of the special case, and it is not probable that they should intend, by a general act, to derogate from that which they have carefully supervised and regulated. * * * Where a particular intention is expressed in an act, which conflicts with a general intention expressed in a later one, the particular intention shall be given effect, leaving the later act to operate only outside the scope of the former." *Cleveland, C., C. & St. L. R. Co. v. Blind*, 182 Ind. 398, 423.

For these reasons, the state railway commission properly declined to entertain the application having no purpose except to increase passenger rates beyond the limit fixed by statute.

WRIT DENIED.

SEDGWICK, J., dissenting.

The relator, the Missouri Pacific Railway Company, filed a petition with the state railway commission asking for permission to increase its passenger rates. The commission dismissed the petition for want of jurisdiction, on the ground that the statute fixes the rate and the commission has no power to investigate the matter. Thereupon the railway company applied to this court for a writ of mandamus requiring the commission to entertain jurisdiction and hear its petition. The question thus presented is whether the state railway commission has jurisdiction to make investigation as to the charges of the railway companies for intrastate transportation of passengers.

At the general election in the fall of 1906 an amendment to the constitution was adopted creating a state railway commission, imposing certain duties upon the legislature in regard thereto, and in the meantime conferring certain powers and duties upon the commission so created. The amendment is section 19*a*, art. V of the Constitution, and is as follows: "There shall be a state railway commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the

legislature. Of the three commissioners first elected, the one receiving the highest number of votes shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

Pursuant to this amendment, there was introduced in the house of representatives by the joint committee on railroads, on the 11th day of February, 1907, a bill entitled: "A bill for an act creating and defining the powers, duties and qualifications of the state railway commission and the secretary thereof and fixing their compensation; defining railway companies and common carriers, regulating the same, and providing the method of fixing, establishing, publishing rates, charges and classification for the transportation of passengers, freights and cars, including joint through rates and joint traffic arrangements, over and upon the various lines of said railway companies and common carriers in this state; the method of making, establishing and enforcing the general orders of said commission; defining unjust discriminations; to provide penalties for the violation of the provisions of this act, and to repeal all acts or parts of acts in conflict herewith, and to declare that an emergency exists."

Also on the 6th day of February, 1907, there was introduced in the house of representatives by the joint committee on railroads a bill entitled: "A bill for an act to amend sections 10058 and 10059 of Cobbey's Annotated Statutes for the year 1903, to fix a maximum passenger rate and to repeal said sections." This latter statute was duly enacted, and was approved by the governor on the 6th day of March, 1907. Laws 1907, ch. 92. It contained an emergency clause, and took effect March 6, 1907. The railway commission act was approved on the 27th day of March, 1907. Laws 1907, ch. 90. It also contained an

emergency clause and took effect on the day of its approval.

The regulation of rates is a difficult and complicated matter. It involves the consideration of values and other things which the legislature itself is without necessary facilities to ascertain. The legislature, realizing this, and knowing the purpose of the people of the state in providing a state railway commission, has supplied these facilities in detail to that commission and made liberal appropriation for that purpose. If the legislature has power under the constitution to regulate rates without the assistance of the railway commission, it will not be considered to have done so unless that intention is expressed in direct and unequivocal language. These two statutes were pending before the legislature and were being considered at the same time; they were considered together. The two acts must be construed together as one act, and we must consider the rate statute as if it had been inserted as a part of the commission act; then we should harmonize the whole and derive the intention of the legislature therefrom.

In *Chicago, B. & Q. R. Co. v. Winnett,* 89 C. C. A. (U. S.) 222, it was said: "The legislature would have full power to delegate to the Nebraska State Railway Commission the authority to fix rates for the transportation of passengers and freight by common carriers within the state of Nebraska if the constitution were silent upon that subject." The constitutional amendment contemplated that the regulation of rates and general control of common carriers would be delegated to the commission, and the presumption arises that the legislature, even if it retained the power to fix rates independently of the commission, would in the first instance delegate all such powers to the commission. If, therefore, the language of the legislature subsequent to the amendment of the constitution is ambiguous or of doubtful meaning, it should be considered as delegating such powers.

The supreme court of Missouri, in construing a somewhat similar statute, used the following language, which seems to be pertinent here: "Therefore it follows that, if

the hand of the legislature by former acts was so laid on rates that no power existed to increase a hard and fast maximum general statutory rate (established to cover all cases and arrived at by legislative guess, however intelligent the guess may be, as seems to be the case at the time the utilities act was passed), the conclusion is irresistible that the legislature intended its hand should be lifted, and that by general rules and methods prescribed for the guidance of the commission, as here, it was intended that it first ascertain the facts and next should apply them in regulating rates, up or down. * * * Moreover, it was recognized that a mere legislative opinion on what a just rate should be (with the chance of the facts upon which the opinion was based being found nonexistent or untrue in part by the courts) was an uncertain and unscientific basis for a rate, although the right under the police power to prescribe rates is taken as a legislative right. The history of the times shows (and we have no call to pretend ignorance therein) that a scientific plan of valuation of railroad properties actually used in the public service has come to be deemed an essential element at getting at just compensation, thereby excluding fictitious or sentimental values, mere 'wind and water,' on one side, and including actualities, on the other." *State v. Public Service Commission,* 259 Mo. 704, 725. As was said by the supreme court of Florida: "The complex and ever-changing conditions that attend or affect the performance of the useful public service rendered by common carriers, make it impracticable for the legislature to prescribe all the necessary rules and regulations." *State v. Atlantic C. L. R. Co.,* 56 Fla. 617, 32 L. R. A. n. s. 639.

Subdivision *b,* sec. 2 of the commission act (Laws 1907, ch. 90) gives the commission general control over common carriers, including the "power to regulate the rates and services." There is, of course, no doubt that the legislature may delegate to the commission such power to fix rates as the legislature itself possesses. If we consider that the constitutional amendment left with the legislature the general power to supervise and control the regulation of rates,

and also consider that conditions upon which the reasonableness of rates depends are continually changing, so that a rate fixed in 1906 might soon become unreasonable, as either too high or too low, it might well be expected that the legislature would fix a rate which should control until the commission could investigate conditions and exercise the comprehensive power devolved upon it by the constitutional amendment and perform the duties specifically imposed upon it by the legislature itself. This intention of the legislature that the rates so fixed should be investigated by the commission from time to time is fully stated in the title of the act and is plainly expressed in the commission act itself.

We have seen that subdivision *b*, sec. 2 of the act, provides that the commission shall have power to regulate the rates and service of common carriers. Subdivision *d* provides that the commission "shall have the power, and it shall be its duty to make all necessary classifications and to fix all necessary rates, charges and regulations to govern and regulate the freight *and passenger tariffs* of railway companies and common carriers." This seems to be a direct and positive declaration of the commission act itself that the power and duty of the commission to investigate and determine the reasonableness of passenger rates is conferred and continued by that act. Section 5 of the act makes it the duty of all common carriers to file with the state railway commission all freight and passenger schedules of rates as herein provided for, "and afterwards, if they deem advisable, they may make partial or special classifications for all or any of the railroads subject hereto, and fix the rates to be charged by the roads therefor; and such classifications and rates shall be put into effect in the manner provided for general classifications and schedules of rates. The commission shall have the power to *alter, change, amend or abolish any classification or rate when deemed necessary,* and such amended, altered, or new classifications *or rates* shall be put into effect in the same manner as the originals. The said railway commission shall fix as soon as practicable thereafter a schedule

and classification of rates and charges. * * * A copy or copies of said schedule or any part thereof when duly authenticated shall be received in evidence in all courts in this state without further proof as *prima facie* evidence that the rates therein contained are those fixed by said railway commission and that said rates are, *prima facie,* just and reasonable." The same section also provides that any rates fixed by the commission in said schedule may, upon the complaint of any person, be changed, and such change shall govern the common carriers. There can be no doubt, when the title of the act, the preceding sections, the general powers of the commission, and the nature of their duties defined in the constitution are considered, that these sections refer to and include passenger rates. If any doubt still existed, it is removed by the following sections of the act. Section 8 of the act provides that the common carrier shall "print and keep for public inspection schedules showing the rates, fares and charges for the transportation of passengers and freight which have been fixed and established as herein provided, and which are in force at the time upon its railroad or railroads." This section declares as plainly as words can that the rates mentioned in the preceding sections, and by those sections expressly required to be fixed by the commission, include passenger rates as well as all others. Section 13 of the act imposes a penalty upon any railroad or common carrier that "shall charge, collect, demand or receive * * * a greater rate, charge or compensation than that fixed and established by the railway commission for the transportation of freight and passengers, or cars." This section is, of course, intended for continued application in the future. It provides no penalty for disregarding rates fixed by the legislature, but expressly fixes a penalty for charging a higher passenger rate than is fixed by the commission. If the commission should name 2½ cents as the passenger rate, this statute would apply, and to charge more than the rate so fixed by the commission would be criminal; but no penalty is incurred by charging more than the rate named in

the so-called passenger rate statute. Yet it is decided that the commission cannot fix passenger rates.

Subdivision *c*, sec. 15 of the act, makes it unlawful for any "railway company or common carrier to change any rate, schedule or classification until application has been made to the railway commission and permission had for that purpose." This implies that upon such application and permission any rate can be changed, and plainly provides that the commission may investigate upon application and fix and establish rates "for the transportation of (both) freight and passengers."

The constitutional amendment required the legislature to provide by law for the regulation of rates of service and general control of common carriers. In obedience to that requirement, they enacted this comprehensive statute for that purpose, as the title shows. In that act they provided again and again that the commission should investigate and fix passenger rates. It seems that the very fact that the legislature reiterated this command to the commission to fix passenger rates has weakened the command itself. The direct and unequivocal language of the legislature (section 5): "The commission shall have the power to alter, change, amend or abolish any classification or rate when deemed necessary, and such amended, altered, or new classification or rates shall be put into effect in the same manner as the originals," is now disregarded or annulled. If the commission can "abolish" any rate, and make a new one and put it into effect, an oversight of the legislature, if any there be, in some minor act, and failure to make the language of such minor act definite, cannot surely overrule the plain language, as well as the whole tenor and effect, of the comprehensive commission act, as well as the spirit and intention of the constitution itself. The legislature knew that conditions are continually changing, and that any rate fixed might become too high or too low upon change of conditions. There was therefore incorporated in the commission act the direct and positive provision that the commission shall have power to alter, change, amend or abolish any rate when deemed necessary

(section 5), which is a direct declaration that rates then or at any future time prescribed by the legislature would be temporary and might be changed by the legislature or investigated by the commission.

The fifth paragraph of the syllabus of the majority opinion, and the authorities cited supporting it, have no application in this case. The general commission act is not to be construed separately as a later act. The two acts are to be construed together as one act, as the majority opinion itself declares. The passenger rate act is not "in conflict with a general intention expressed in a later enactment," but is in harmony with it, being intended to operate only until the commission can perform the comprehensive duties imposed upon it. Since the two statutes are to be construed together as one act, the construction given them by the majority opinion creates the situation of inconsistent provisions of the same act. In such case, if the provisions are in fact inconsistent, the latest expression controls. This rule is universal.

The majority opinion says that the legislature has "left the state railway commission free to change or abolish rates within the bounds thus set by the lawmakers;" that is, if the application had been to lower the passenger rate, the commission would have jurisdiction, and therefore the duty, to investigate conditions. This duty of the commission is not in the rate act. It must therefore be derived from the comprehensive commission act.

All agree that the two acts should be construed together, and both enforced, if possible. The complete commission act is so plain that its meaning cannot be misunderstood. It requires the railway commission to make schedules of rates, including passenger rates, and revise them from time to time, and ought to be enforced, if possible. Passenger rates, in the nature of things, cannot be permanent. If there was no railway commission, such rates would have to be revised from time to time by the legislature itself. The legislature has already found it necessary to change the rate. The statute fixing the rate at two cents was intended as a temporary act until necessary investigations

could be made and the truth learned. To so regard it is all that is necessary to make the two acts consistent and enforce them both. We ought to do that, and not convict the legislature of enacting at the same time two inconsistent acts. The railway commission by express and plain provisions of the statute can investigate, make schedules of passenger rates, and can "alter, change, amend or abolish" passenger rates. This is inconsistent with the thought that the legislature, or the commission, or anybody else, ever has made or ever will make a permanent rate. The legislature has not taken over passenger rates to itself, with intention of itself changing or modifying them from time to time, as changing conditions require, without the assistance of the commission, or its investigation.

By construction there is added a proviso to the passenger rate act, "Provided, that the railway commission may investigate and lower this rate, but they shall never raise it," and so by construction the two statutes are made inconsistent. It would be equally reasonable to make the proviso to the passenger rate act, "Provided the railway commission may investigate and raise this rate, but they shall never lower it." "Alter, change, amend" can be construed to mean "raise," as well as to mean "lower." If the legislature intended that the commission could change and alter the passenger rate only in one direction, why not say that the commission can raise the rate, but cannot lower it? If the railway commission act is amended by construction, and the word "lower" is substituted for the words "alter, change, amend," we will have to also amend many other sections of the act. "The railway commission shall fix as soon as practicable thereafter a schedule and classification of rates and charges, except joint rates hereinafter provided for, for the transportation of freights, passengers and cars over the various lines of railroad in this state" will have to be amended so as to read, "Except passenger rates and joint rates hereinafter provided for," and eliminate the word "passengers" where it now appears. There are many other provisions that are entirely inconsistent with the idea that the legislature

intended to fix passenger rates permanently, so that there can be only a one-sided investigation thereof. This would be contrary to the intent of the constitutional amendment, which contemplates that the commission shall investigate all railroad rates, etc. The two statutes, as enacted, are not inconsistent, and we ought not to make them so by construction. Even if all that the commission can do is to lower the rate, they ought, at least, to entertain an application to change the rate, hear the evidence offered, and lower the rate if conditions require it. The power to lower rates includes the power to investigate conditions.

The same legislature enacted a statute to fix a maximum charge for the transportation of money or merchandise by express companies, and also an act fixing maximum rates for the transportation of certain property, and each of these acts contains a provision that the rates so fixed should continue only until the state railway commission should fix definite rates. It is reasoned from this that, since the passenger rate act contains no such provision, the fact that these two acts enacted by the same legislature expressly reserved to the railway commission power to modify the rates so fixed indicates that the legislature intended that the passenger rate should be beyond the control of the railway commission. But the two acts in question were both approved and in effect after the passage of the railway commission act, and, without such provision, reserving the investigation and control of express and freight charges to the railway commission might have indicated an attempt to deprive the railway commission of jurisdiction over such matters. No such provision was necessary in the act which was contemporaneous with the passenger rate act, and must be construed with it, and was passed before the commission act was enacted, and the fact that the legislature inserted such provisions where there might be a doubt of the legislative intention to submit all such matters to the investigation and control of the railway commission may be considered to indicate that the thought was that the two acts introduced by the judiciary committee would be construed together, and that the

comprehensive act, which became a law after the passenger rate act, and which so plainly committed to the commission the investigation and regulation of passenger rates, leaves no room to doubt the legislative intention.

The two-cent rate act of 1907 is simply amendatory of the rate fixed in a prior statute. If the prior statute had been allowed to remain without any change of rate, it would not be contended that the commission act intended to withdraw the subject of passenger rates from the consideration of the commission. The rate fixed by the former act was assumed by the legislature to be too high, and, as necessarily much time would be consumed in the investigations of the commission and revising the tariffs, the rate prescribed by the former act was changed.

Chapter 94, Laws 1907, requires railroad companies to issue and sell mileage books of 1,000 miles each. It provides that such mileage books shall be sold "for a sum not to exceed twenty dollars ($20) per one thousand miles." The intention was that this rate should correspond with the general passenger rate then in force, or which might thereafter be in force, to be abolished or amended when deemed necessary. Passenger rates must be fixed with regard to passenger service. The rate cannot be made higher nor lower than the cost of the service and reasonable profits for the purpose of equalizing a supposed deficiency or excess of earnings of the freight service. The supreme court of the United States has so decided. "The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned." *Northern P. R. Co. v. North Dakota,* 236 U. S. 585, 597, and cases cited. It was therefore wholly impracticable to fix passenger rates permanently without reference to freights and other considerations, and it is incredible that the legislature ever could have attempted to do so.

When we consider the title and provisions of this commission act, and that it was considered with, and approved and took effect after, the two-cent passenger rate act, there seems to be no doubt whatever that the legislature in-

tended that the passenger rate act should be temporary and should regulate those rates until such time as the commission might fully investigate conditions as contemplated by the legislature and establish suitable rates for the freight and passenger traffic of the railroads.

LETTON and BARNES, JJ., concur in this dissent.

ANDREW HANIKA, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JUNE 19, 1915. No. 18177.

1. **Appeal:** INSTRUCTIONS: OBJECTIONS: WAIVER. It is the duty of the trial court, when charging the jury, to state the issues with reasonable definiteness, and a failure so to do may constitute reversible error; but, in order to be available as such, the attention of the court must be called to its oversight at the time the instructions are given. A failure on the part of the parties to so act will amount to a waiver of the error.

2. **Trial:** REFUSAL OF INSTRUCTIONS. The instructions requested by defendant and refused by the court, referred to in the opinion, *held* properly refused.

3. **Appeal:** CONFLICTING EVIDENCE. "Where the evidence is fairly conflicting, the judgment will not be reversed merely because in this court the preponderance seems probably to have been in favor of the unsuccessful party in the district court." *Greer v. Winter*, 49 Neb. 705.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

C. S. Allen, O. B. Clark, Frederick Shepherd and *Field, Ricketts & Ricketts*, for appellant.

Strode & Beghtol, contra.

FAWCETT, J.

From a judgment of the district court for Lancaster county, in favor of plaintiff, in an action for personal injuries, defendant appeals.

Plaintiff and a friend were walking west on the sidewalk on the north side of P street, in the city of Lincoln. As they reached Twenty-seventh street (which runs north and south and is traversed by a double track) they appear to have been engaged in a more or less earnest conversation. Plaintiff testified that when they reached the street intersection he looked both ways; that he saw a car coming from the north, but did not see any coming from the south. They started across the street, and just as they had crossed the east track and had reached a point between that and the west track, the south-bound car on the west track came to a stop directly in front of them, which prevented them from proceeding, and immediately the north-bound car on the east track was upon them. The result was that plaintiff fell, and his foot was run over by the north-bound car. The foot was so severely injured that it had to be amputated. The recovery was for $4,000. No complaint is made as to the amount of the recovery. The allegations of negligence pleaded in the petition, stated succinctly, are: (1) That the south-bound car was negligently stopped in front of plaintiff at the intersection at Twenty-seventh and P streets; (2) that the speed of the north-bound car was excessive; (3) that no warning of the approach of the north-bound car was given; and (4) that the motormen on both cars were, or should have been, aware of plaintiff's situation between the tracks, and should have so operated their cars as not to pass each other when he was between them.

The court stated the issues to the jury thus: "(1) In this action the plaintiff sues the defendant for damages, and for hospital and surgical expenses, in the sum of $15,510 alleged to be due to injuries received by the plaintiff from the careless and negligent operation of street cars by the defendant's servants at Twenty-seventh and P streets in the city of Lincoln, on the 24th day of May, 1911. (2) For answer to plaintiff's said petition the defendant denies each and every allegation therein, except that it is a corporation and operates a street railway in the city of Lincoln. Defendant alleges that it was carelessness and

negligence for the plaintiff to attempt to cross defendant's tracks while two street cars were approaching the crossing from opposite directions at the usual rate of speed, under the existing conditions. These pleadings tender the issues which you are to determine by your verdict."

By instruction No. 4 the jury were told: "You are instructed that the burden of proof in this case is upon the plaintiff to prove by a preponderance of the evidence all the material allegations in his petition: That is to say, that at the time of the accident alleged the defendant was guilty of negligence, as stated in the petition; that, as the proximate result of such negligence, the plaintiff sustained injuries, as alleged in the petition, and by reason of said injuries the plaintiff has been damaged, as alleged in the petition; and the amount of such damages. When the plaintiff has so shown these facts, then the burden of proof is upon the defendant to prove by a preponderance of the evidence the allegations of its answer constituting its defense to plaintiff's action: That is to say, that any injuries received by the plaintiff were the proximate result of his own negligence, or that his own negligence contributed thereto as a proximate cause thereof. If, however, the plaintiff's own testimony shows that he was guilty of negligence at the time of the accident, such evidence is to be considered by you as it may bear upon the question of plaintiff's negligence."

It is contended that these instructions did not state the issues raised by the petition. There is force in this contention, and if the failure to more definitely state the acts of negligence upon which plaintiff relied had been called to the attention of the court at the time, in the exceptions to the instructions presented by the defendant, or in a separate instruction tendered by it, and the court had then failed to state the issues more definitely, such failure might be urged here. But counsel for defendant did not do either. In 26 separate exceptions noted at the time, no reference whatever is made to this failure on the part of the court; nor was any instruction tendered. It was too late to complain for the first time in the motion for a new

trial. Moreover, it clearly appears from the bill of exceptions that defendant was not prejudiced by the failure referred to, as the particular acts of negligence alleged in the petition were fully tried by both parties, so that the jury could not have been misled by the manner in which the issues were stated.

It is urged that the jury disregarded the ninth instruction given by the court, as follows: "The plaintiff's view of both cars was unobstructed. It was his duty when approaching the tracks to look in both directions before attempting to cross, and failure to do so, under the circumstances, would be negligence." If this instruction stood alone, there would be force in defendant's contention; but it is followed by instructions 10 and 11, which accurately state the doctrine of the last clear chance. We think the evidence was sufficient to warrant the court in submitting this issue to the jury, and counsel for defendant evidently thought so too, as no error is assigned in that behalf. It follows that the contention as to instruction No. 9 must fail.

By the third assignment, it is contended that the court erred in refusing to give instruction No. 6, requested by defendant. This instruction was properly refused, as it assumed to determine a question of fact which was for the jury. The same is true as to the second, third and fourth instructions, requested by defendant and covered by assignment No. 4.

By assignment No. 5 it is urged that the verdict is not sustained by sufficient evidence. It would be of no benefit to the parties or to the profession to set out the evidence. As stated in the brief of defendant, the charge of negligence rests solely on the conduct of the two motormen. The evidence in relation thereto is conflicting. From a reading of the testimony of the witnesses, as shown in the record, it appears to us to preponderate in favor of the defendant, but that preponderance is not so great as to warrant us in setting aside the verdict of the jury, sustained by the trial court, all of whom had the advantage of hearing and observing the witnesses as they were giving their

testimony. Had we been thus favored, it might have impressed us as it did them. We cannot say that the verdict is clearly wrong.

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

WILHELM FLEGE V. STATE OF NEBRASKA.

FILED JUNE 18, 1915. No. 18468.

1. **Criminal Law**: REVIEW: SUFFICIENCY OF EVIDENCE. It is the settled rule in this court that when a case has been tried two or more times, the verdict each time being in favor of the same party, this court will not set aside the last verdict as being against the weight of the evidence, unless the evidence is clearly insufficient to sustain it. *Dunbar v. Briggs*, 18 Neb. 94; *Missouri P. R. Co. v. Fox*, 60 Neb. 531, 557; *Souchek v. Karr*, 83 Neb. 649.
2. ———: ———: ———. And this rule is not confined in its operation to civil cases, but is equally applicable in a criminal prosecution.
3. ———: ———: ERRORS. And in such a case a third conviction for the same offense will not be set aside for errors occurring at the trial, unless it clearly appears in the record that such errors deprived the accused of a fair trial and were the probable cause of his conviction.
4. ———: MANSLAUGHTER: SUFFICIENCY OF EVIDENCE. The evidence set out in this opinion and in our two former opinions, 90 Neb. 390, and 93 Neb. 610, *held* to be of such a character as to forbid a holding by the appellate court that it is insufficient to sustain the verdict.
5. ———: REFUSAL OF INSTRUCTIONS. The refusal to give requested instructions, proper in form and substance, is not reversible error, when it appears that every material point contained therein is covered by those given by the court on its own motion.

ERROR to the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. J. McCarthy, Fred S. Berry and *M. F. Harrington*, for plaintiff in error.

Grant G. Martin, Attorney General, George W. Ayres, Frank E. Edgerton, C. A. Kingsbury, Howard Saxton and *C. H. Hendrickson, contra.*

FAWCETT, J.

On June 30, 1910, Louise Flege was shot and killed at her home in Dixon county. Plaintiff in error, who will be designated herein as defendant, was charged with her murder. He was first tried in the district court for Dixon county and found guilty of murder in the second degree. That conviction was reversed and the case remanded for further proceedings. 90 Neb. 390. After the case was remanded to the district court the venue was changed to Thurston county, where upon a second trial defendant was found guilty of manslaughter. Error was again prosecuted to this court, and the judgment of conviction again reversed and the case remanded. 93 Neb. 610. A third trial was had in Thurston county and defendant again found guilty of manslaughter, and the case is now before us for a third review. A statement of some of the important facts and circumstances in the case appear in our two former opinions above cited.

In one particular the record now before us differs from the two preceding ones. This difference is found in the testimony given by the medical experts. One of the grounds on which the second conviction (93 Neb. 610) was reversed was that the jury must have ignored the testimony of the medical experts introduced by the defendant. Reference is made to that opinion for a statement of the substance of their testimony. On the third trial the state met this expert testimony with the testimony of two witnesses, Doctor Dunn and Doctor Waite, both men of high standing in their profession. Professor Haines and Doctor Hektoen, who appeared as witnesses for the defendant both on the second trial and on this, testified that from their examination of the stomach contents it was their opinion that Louise Flege was not killed until two and one-half or three hours after she had eaten her dinner, which the uncontradicted evidence shows was at or shortly after 12

o'clock on the day of the tragedy. Eichtencamp, the witness for the state on whose testimony this conviction largely depends, testified that she was shot by the defendant at or shortly after 1 o'clock. She was shot twice, once in the breast and once through the head, the shot through the breast being, unquestionably, the first of the two shots. The question then is: Were the shots which Louise received, or either of them, instantly fatal, and, if instantly fatal, may there have been post-mortem digestion? On both of these points there is now a direct conflict in the testimony of the medical experts. Doctor Dunn and Doctor Waite, and particularly Doctor Waite, testified that digestion in the case of Louise might have continued for an hour or more after death. The stomach contents showed that in some manner or other a considerable quantity of blood had been taken into the stomach, so that at the time the stomach was removed by Doctor Meis its total contents weighed six and one-half ounces, of which two ounces were blood. The evidence is clear that on the day in question Louise was in a perfectly healthy state. It must be presumed, therefore, that her stomach was normal. The secretion of gastric juices in the stomach begins, in most cases, in from five to eight minutes after eating, and in some cases immediately thereafter. The secretions necessary to cause digestion are hydrochloric acid and pepsin. In a person like Louise, who, under any theory of the case, lived for at least an hour after eating her midday meal, there would be the normal amount of secretion of gastric juices. The theory of the doctors for the state is that in a case of that kind, where a person in perfect health is instantly killed about an hour after eating, the hydrochloric acid and pepsin will continue to perform their digestive functions until they have been consumed. Professor Haines for the defense testified that the stomach contents, as examined by him, did not show the presence of any free hydrochloric acid. Doctor Waite testified that under the conditions indicated digestion might continue for a week or more after a healthy person's death, although during that period it might be very much retarded. We think it

is clear from the evidence that the wound in the breast was not necessarily instantly fatal. The evidence as to the wound in the head shows that the bullet entered about two and one-half or three inches behind and on a level with the opening of the left ear, and came out through the left cheek about an inch below the eye. Professor Haines testified that he was not an expert on such matters, and declined to give an opinion as to whether or not the shot was instantly fatal. Doctor Hektoen and two or three other witnesses for the defense testified that that shot was instantly fatal, and Doctor Hektoen testified that after death there would be no digestion in either the stomach or the stomach wall. Doctors Dunn and Waite for the state testified that you could not tell from the mere fact that the bullet entered and came out at the points indicated that the shot was instantly fatal; that the bullet may have been deflected; that in penetrating the skull it may have been deflected and passed around on the inside of the skull, missing the vital parts, and then have come out through the cheek; that the fact that you could pass a probe straight through from the point of entrance to the point of exit does not prove that the bullet went straight, for the reason that, on account of the softness of the brain tissue, a probe could be passed right through the brain. The question, therefore, on this point is, not necessarily when Louise was shot, but when she died. If the shot through the head was instantly fatal, Eichtencamp's story was probably false; while if it was not instantly fatal, so that she may have lain there in an unconscious condition for a period of an hour or more before she died, his story could be true. Whether it was true or false was a question for the jury.

We shall not attempt an elaborate review of the testimony of the various witnesses, but will refer to enough to show that counsel for defendant were mistaken when they said in their argument at the bar that the conviction in this case rests entirely upon the uncorroborated testimony of Eichtencamp. Herbert Henrichs testified that on the Friday prior to the tragedy he and defendant were talking

about Louise, and that defendant said "he would get hell again in the morning from Louise, and he thought he was his own boss, she didn't have no business scolding him all the time, and he soon would be done with her." He further testified to a conversation with defendant on August 15, 1910, which was about a month after Eichtencamp had charged defendant with the crime; that defendant asked him in that conversation who he thought "done that;" that witness said to him, "Albert couldn't tell such a story about him doing it if it wasn't true;" and that defendant said, "That didn't make any difference, he had a better attorney than Kingsbury, and he'd get out of that all right, and if Kingsbury got another one he would get still a better one." A. H. Maskell testified to having a conversation with defendant subsequent to the tragedy and after defendant had been charged with the crime, in which he asked defendant why he had bought his revolver; that defendant in answer said he did not know why, that he just wanted a revolver; and that he said, "If I didn't have this revolver I would not had this trouble." The record shows that defendant and his brother Fred returned from Dixon to the home of the latter about 4 o'clock that afternoon, and that defendant left there about half an hour later, as Fred supposed, for his home. He was driving his car, in which he could have reached his home, about a mile and a half away, in from five to ten minutes. Instead of going directly home, he stopped at the Henrichs place, visited a while with the Henrichs girls, and then went out into the field, as he says, to invite the Henrichs boys to a beer party which was to be given at Fred's home that evening by Fred's hired man. He remained in the field for an hour or more. Between 6 and 7 o'clock Eichtencamp telephoned to Fred's residence and inquired for defendant. Fred seemed surprised that defendant had not reached home. Eichtencamp told Fred that he had better come over; that Louise was lying in the yard, and was "pretty nearly all in." Fred telephoned the Henrichs place and requested them to tell the defendant to go home. Fred then ran across the field to defendant's place. When he arrived he

found Louise lying in the yard, dead. Within about a minute after Fred arrived, defendant appeared. Fred testified that when the defendant came up he said to him, "Well, now we got it; if you had stayed home a little better probably this would not have happened." He also testified that he asked him where his revolver was. As these two brothers stood by the side of their dead sister, who had been foully murdered, Eichtencamp, the only man, so far as they knew, who had been on the farm that afternoon, stood about 50 feet away; yet neither of them asked him a question as to when he had first discovered the body, or whether he had seen any one around that afternoon, or had heard the shooting. This is sought to be explained by counsel by saying that the defendant is a man who is dull of comprehension and does not think quickly. No such contention is made, however, for Fred. We have no doubt that the testimony of defendant himself and of his brother Fred, with regard to this incident, was regarded by the jury as strong corroboration of the story told by Eichtencamp at the trial. Reference was made in one of our former opinions to the weeds that were cut in the garden on the day of the tragedy. It is argued here that the testimony shows that those weeds must have been cut in the afternoon of that day, and that, if so, they were cut by Louise after defendant had left home for Dixon, and that this disproves the testimony of Eichtencamp. The witnesses who testified upon this point are the witnesses Lessman and Sohren. On cross-examination neither of these witnesses would say that those weeds might not have been cut in the forenoon, or as early as 9:30 o'clock. This testimony, therefore, does not contradict the testimony of Eichtencamp as to the time Louise was shot. Reference was also made in a former opinion to the testimony of two witnesses as to hearing a shot about 3 o'clock in the afternoon. Jacob Koth testified that he heard a shot at the Flege place about 3 o'clock that afternoon. He testified to but one shot. Two were fired, unquestionably close together. Why did he not hear both shots? Alice Mau is the other of the two witnesses. She testified that about

3 o'clock that afternoon, while she was at the mail box, she heard a sound similar to a loud pounding or the report of a gun. She heard but the one report. Henry Henrichs testified that between 3 and 4 o'clock that afternoon he was fixing a 14-horse power gasoline engine, and that after fixing it he started it up, and he described the explosion made by the engine when it started. He testified further that the Mau mail box was closer to his place than to the defendant's; that the mail box is north of his place, and defendant's place is southeast of his. "Q. Then your place would be between the defendant's place and the mail box where the Mau girl went to get her mail? A. Yes, sir." It is said in the brief of counsel for defendant that, "whenever the necessity or importance of developing new evidence becomes apparent to counsel for the state, they never have to or at least never do, go outside of the Henrichs family." The jury saw the members of "the Henrichs family" on the witness-stand, and evidently did not form the same opinion as to the character of their testimony as that formed by counsel for defendant. It also appears that after the defendant was told that Eichtencamp had charged him with the commission of the crime, and on the same day, he was taken by the officers in an automobile to Ponca; that on that trip he rode in the same seat with Eichtencamp without uttering a word of reproach to Eichtencamp for having, as he now claims, charged him with so foul a crime. A number of other instances are testified to by the witnesses, which we will not burden this opinion by repeating, but will simply say that there were other circumstances detailed, some of them apparently trivial in their nature, but which, taken together with those we have referred to, were sufficient to negative the contention that Eichtencamp's testimony is without corroboration.

The fact that Eichtencamp's testimony at the coroner's inquest, in the early morning after the tragedy, was such that defendant could not be guilty, and that he then sought to bolster up his testimony by testifying to other circum-

stances that were not true, does not necessarily show that he did not testify to the truth at the trial. He explains his former testimony now by saying that, as defendant drove away after shooting Louise, he warned him that if he told anybody what he had seen he would get the same as Louise, and that he was afraid that defendant would do as he had threatened. He was then a boy in his teens, and if he had seen the defendant ruthlessly shoot down his own sister, without, so far as he knew, any cause for so doing, he might well fear that such a man would not hesitate to execute his threat if he failed to heed the warning given. Of this fact the jury were in a better position to be the judges than we are.

In the present consideration of the case, we are confronted with the rule: "If a case has been tried three times, the verdict each time being in favor of plaintiff, this court will not set aside the last verdict as being against the weight of the evidence, unless the evidence is clearly insufficient to support the verdict." *Souchek v. Karr*, 83 Neb. 649, and cases therein cited. It is true that was not a felony case, but the rule seems to be the same, whether it be a civil action or a criminal prosecution.

In 2 R. C. L. p. 199, sec. 169, it is said: "Where a verdict is a second or succeeding verdict and is in accordance with the prior verdicts, the reviewing courts are less inclined to set it aside than if it were a first verdict. Still a verdict controlled by no reason, supported by no justice, and which is manifestly the result of passion and prejudice, will not be sustained on appeal, no matter how many similar verdicts may have been previously returned in the case. This rule is not confined in its operation to civil cases, though it is more frequently so applied, but it is equally applicable in a criminal case."

The author cites in support of his text *State v. Cross*, 12 Ia. 66, wherein, at page 68, it is said: "It will be observed that the defendant objects to a second verdict finding him guilty of the same offense. It is true that the first was set aside, because the court was satisfied that it was not the free and unbiased conclusion of *one* of the

jurors. And, giving to the defendant all benefit resulting from this fact, it still appears that at least 23 jurors, under their solemn oaths, have found him guilty of this offense. This consideration has much weight with us in sustaining the ruling below."

In the light of the rule as above announced, which we think is sound, unless we can say that the evidence "is clearly insufficient to support the verdict," it is our duty to sustain it. In reviewing a first conviction, we might be justified in giving the accused the benefit of any doubt existing in our minds, and grant him a new trial; but, after three different juries have found him guilty of the crime charged, it would be an unwarranted invasion of the province of the jury to set aside the third conviction, unless well satisfied that the defendant has not had a fair trial, and that the evidence was clearly insufficient to show his guilt.

We come now to a consideration of the assignments of error occurring at the trial. Does the same rule apply here, viz.: Should a third conviction for the same offense be set aside for errors occurring at the trial, unless it clearly appears that those errors deprived the accused of a fair trial and were the probable cause of his conviction? We must answer that question in the negative. We have gone through this record with great care, and, while the trial court made some rulings on the admission and exclusion of evidence that we would not have made had we been trying the case, we do not think they are of such gravity as to call for a reversal. We are unable to discover any error in the instructions given by the court. Instruction No. 12, defining motive, is assailed, and it is urged that this instruction was declared erroneous in our first opinion, 90 Neb. 390. The first paragraph of the instruction as given at this trial comprises the whole of the instruction given at the former trial. As so given it was condemned; but on this trial the court added what it considered would meet the criticism of the instruction in our former opinion. We think the addition made by the court is sufficient to relieve it from our former criticism, and,

as given at the last trial, it did not constitute reversible error. The case then resolves itself down to one point, whether the court erred to such an extent as to demand a reversal because of the instructions which defendant requested and which were refused. The court's charge to the jury contained 28 separate paragraphs. The assignments of error discussed in defendant's brief cover 14 instructions requested by defendant and refused by the court. It would unnecessarily lengthen this opinion to refer to these instructions in detail. We deem it sufficient to say that every material point tendered by them is covered by the charge given by the court on its own motion.

Thirty-six jurors, twelve of them residents of defendant's own county, where he has lived substantially all his life, after having seen Eichtencamp and the defendant and the other witnesses upon the witness-stand and heard them give their testimony, have said by their verdict that they believe Eichtencamp is now telling the truth. The trial judge has sustained them in so finding. As an appellate court we must sustain the conviction, unless we can conscientiously say that we are satisfied that the jury were actuated by passion or prejudice, or that they were not warranted in giving credit to the testimony of Eichtencamp and discrediting that of the defendant. This we cannot say.

Finding no error in the record which would justify setting aside this, a third conviction, the judgment is

AFFIRMED.

HAMER, J., not sitting.

SEDGWICK, J., dissenting.

I think that the majority opinion gives altogether too much consideration to the fact that there have been three jury trials and three verdicts against the defendant. It is said that the rule to be enforced is: "If a case has been tried three times, the verdict each time being in favor of plaintiff, this court will not set aside the last verdict as being against the weight of the evidence, unless the evidence is clearly insufficient to support the verdict."

Souchek v. Karr, 83 Neb. 649. But the settled rule of this court is that a verdict will not be set aside because of insufficiency of the evidence in any case, unless "the evidence is clearly insufficient to support the verdict." This pronouncement, then, in the *Karr* case is nothing more than a declaration that the court will consider the fact that former verdicts have been found against the defendant. How much consideration should be given to that fact depends upon circumstances connected with the former conviction. In the citation from 2 R. C. L. p. 199, sec. 169, the author is speaking of directed verdicts and cases where former verdicts have been set aside for insufficiency of the evidence. If the court has declared that the whole evidence, fairly considered, is insufficient to sustain a verdict of guilt, and again a second verdict, and a jury finds a third verdict of guilt upon the same evidence, the court would seriously consider whether to affirm the third conviction or dismiss the case, and that would, under the decision in *Souchek v. Karr, supra,* depend upon whether the verdict was clearly wrong. If, on the other hand, the former verdicts were set aside for errors in submitting the case so that the merits of the case had not been passed upon by the jury, if the verdict of guilt in the former trials was caused by erroneous instructions, it could not be considered that the jury had passed upon the sufficiency of evidence. It was the instructions of the court that caused the former verdicts, as though the court had instructed the jury to return such verdicts. In the Iowa case cited, *State v. Cross,* 12 Ia. 66, the former verdict had been set aside because one of the jurors had not clearly consented to a verdict of guilty. The case was properly submitted, and eleven jurors had found the evidence sufficient. The court gave some consideration to the fact that 23 jurors had passed upon the sufficiency of the evidence. We give much consideration to the fact that one jury has done so, and will not set aside their verdict unless clearly wrong. This court has said that the first two attempts were mistrials. If this defendant has now had a fair trial, that is, if the evidence has all been fairly

submitted to the jury, the question for the first time is whether that evidence proves the defendant's guilt beyond a reasonable doubt.

There is no direct evidence of the defendant's guilt, and no proof of any tangible fact that necessarily points to his guilt, except the evidence of the witness Eichtencamp. Flege is the defendant, and of course his interest in the case is such that his evidence must be carefully scrutinized. When it became evident that either Eichtencamp or Flege committed this crime, and Eichtencamp was informed that that was the conclusion of the prosecuting officers, it became at once a contest between Eichtencamp and Flege, so that Eichtencamp's evidence is also to be considered in view of that fact. When a great crime is committed that becomes notorious and shocks the whole community, it is natural for people, especially those who have had no experience in weighing evidence, to entertain belief as to who is guilty. When an ordinary individual gets the belief in his mind that a certain one is guilty, then his imagination will help out, and anything that appears tends to confirm that belief, and so in this case, in proving indications of Flege's guilt derived from his conduct, we have the state proving by its witnesses that he did not cry, and those who are inclined to believe him guilty rather than Eichtencamp consider it some evidence of his guilt. The state by other witnesses proved that his eyes were red and his face swollen. That circumstance was perhaps inconsistent with the other, but was also evidence of guilt to those who observed that fact. I do not find in any of these statements in regard to what Flege did and how he acted any evidence whatever that tends to corroborate Eichtencamp. There is no man that can tell how he himself would look and exactly how he would act if he should go to his back yard and find a member of his own family horribly murdered. There are no two men who would act exactly alike under such circumstances, and we cannot tell from the fact that defendant did or did not cry, or that his eyes were red, anything about his probable guilt. In order to support the verdict we must believe Eichtencamp.

He is a perjured witness, self-confessed, and with the same interest as though he himself were on trial for this crime. It is more than probable that either Eichtencamp or this defendant committed this crime. Two witnesses testified that they heard a pistol shot at the Flege place at about 3 o'clock. If that is true, the defendant is probably not the guilty party. The defendant was not in that vicinity after about 1 o'clock that day. Of course, these witnesses may be mistaken. Several of the witnesses testified that they were within hearing distance and did not hear any pistol shot at about 1 o'clock, the time that Flege left. That evidence is not very important, because they might not have heard it, but it is to be considered. Eichtenkamp told many persons soon after the murder that after Flege had gone he went to the house and found Louise there. He swore to that upon the first investigation. There is no doubt about that. That he did so state and did so swear is proved by unimpeachable evidence. If he told the truth then, rather than upon the final trial, when he had an interest in testifying as he did, Flege is not guilty, since Louise was alive after Flege left. Dr. Haines, whom we all know to be absolutely competent and unprejudiced, testifies that, under the circumstances from his investigation of the contents of the stomach, he knows that Louise was not killed before 2 o'clock, and probably not until 3. He is supported by another witness who is unprejudiced. If this testimony is true, Flege is not guilty. They attempt to meet this testimony in several ways. They put on several experts, who were apparently competent, to testify that when a person is killed, if there is a supply of gastric juice in the stomach, digestion will proceed until that supply is exhausted. They do not pretend that the stomach will keep on supplying this gastric juice after death. There is some other testimony upon that line that it is not necessary to mention. These experts seem to conclude that it is possible (barely possible) that Louise may have been shot as early as 1 o'clock. The evidence does not prove beyond a reasonable doubt that she was shot as early as 1 o'clock, and, if she was not, Flege is not guilty.

To further strengthen this evidence, one witness testifies that a bullet fired through the head as this one was might not produce instant death. His reason is that it might be deflected, and so pass around the brain, but certainly these doctors know whether the bullet went through the skull and came out through the skull. As it did go through the skull, what could it strike that would deflect it? The witness says that passing a probe through the course of the bullet would not prove that the bullet went directly through, because the probe would pass through the soft brain tissues; but I should think that the bullet would too, unless the brain was hard enough to deflect it, which is not probable. A circumstance which they prove and which they seem to think indicates Flege's guilt is that he was slow about getting home after he and his brother had been to town. This they say indicates that he was dreading to meet the facts of Louise's death; but to a man who wanted to find Flege innocent it might just as well mean that he had not known that any harm had come to Louise, or that there was any necessity, now that he had spent the most of the afternoon, of hurrying home. This conviction seems to be sustained upon the theory that, when a case has been tried three times to a jury and the defendant is found guilty every time, the court will not set aside a verdict, unless it is clearly wrong; but that is true in any case, and the rule has no application except in those jurisdictions where the court has refused to set aside the verdicts of juries, even if they are clearly wrong. If the verdict is clearly wrong, and Flege is not guilty of this murder, a hundred irregular and illegal trials will not make him guilty. It is possible that Flege may be guilty. Somebody is guilty, without doubt; but the fact that they cannot prove with certainty that some one else is guilty is not a sufficient reason for convicting Flege. There are circumstances clearly proved which tend to corroborate the defendant's testimony, and none of importance which corroborate the story which Eichtencamp now tells. There is no reason for believing Eichtencamp rather

than the defendant, and therefore the defendant is not proved guilty beyond a reasonable doubt.

BARNES, J., concurs in the above dissent.

LONZO D. WHITFORD, GUARDIAN, APPELLANT, V. HENRY KINZEL ET AL., APPELLEES.

FILED JUNE 18, 1915. No. 18765.

Homestead: ABANDONMENT: SUFFICIENCY OF EVIDENCE. The evidence examined and set out in the opinion *held* sufficient, when considered in connection with the evidence adduced at the former trial and preserved in the record now before us, to sustain the burden cast upon the defendants by the second paragraph of the syllabus of our former opinion, reported in 92 Neb. 373.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Affirmed.*

William V. Allen and *William L. Dowling,* for appellant.

A. R. Oleson, contra.

FAWCETT, J.

This is the second appeal in this case, and the third time that it has been before us for consideration. A statement of the issues and of the facts, as disclosed by the record of the first hearing in the district court, will be found in our opinions on the hearing and rehearing of the former appeal. 90 Neb. 573, and 92 Neb. 373. At the hearing of the former appeal we held that the evidence was insufficient to show that at the time Mrs. Browand left Nebraska she was insane or so unsound or unbalanced mentally that she was not competent to understand the nature and import of what she was doing, but that it was sufficient to show that she voluntarily left her husband and abandoned her home and any right of homestead that she may have had in the land in suit, with no intention of ever return-

ing or of ever again asserting those rights. On the rehearing we adhered to our former holding as to the insufficiency of the evidence to show Mrs. Browand's mental incapacity to understand the nature and import of what she was doing, but receded from our former holding that the evidence was sufficient to show that she voluntarily left her husband and abandoned her home, etc. The reason for receding from that part of our former holding will be found in the second paragraph of the syllabus in the opinion on rehearing, where it is held: "All presumptions are in favor of the preservation of the homestead, and, when it is sought to show its abandonment, the burden of proof rests upon the person who attacks the homestead interest." In the opinion we held that defendants had not sustained that burden. The judgment of the district court having been in favor of the defendants, it was reversed and remanded for further proceedings. There was a second hearing in the district court, which resulted as before, and plaintiff again appeals.

Counsel for plaintiff in their brief say: "The sole question therefore, in the case, is this: Have the defendants established by a preponderance of the evidence that Mrs. Browand abandoned her homestead?" We agree with counsel in this statement, and shall consider only that question.

The evidence taken at the first trial in the district court was reoffered at the second trial, and is again before us. It comprises the first 293 pages of the bill of exceptions. The remainder of the bill covers the evidence taken at the second trial. We deem it unnecessary to again refer to the testimony taken at the first trial, more than to say that it then was considered sufficient by three members of the court to establish such abandonment. It is only necessary, therefore, to review the additional evidence furnished at the second trial for the purpose of determining whether or not, when added to the testimony at the first trial, it is sufficient to sustain the burden cast upon the defendants by our second opinion on the first appeal. Before entering upon a consideration of that testimony, we

call attention to one fact which was left more or less in doubt by the record on the first appeal, viz., whether Mr. and Mrs. Browand, at the time of leaving the state, sold off all of their goods and household effects, or whether they stored them, or a considerable portion of them, in town, and Mr. Browand, on a subsequent visit to the state, sold the same. This matter is made clear at the second trial. The evidence now leaves no room for reasonable doubt that before Mr. and Mrs. Browand left the state, or left the land, they had a sale and sold all of their personal effects, including their household furniture, beds, bedding, etc.

The only new testimony offered by plaintiff as to Mrs. Browand's intention to return is the testimony of relatives in Indiana, to the effect that after she had left Nebraska and gone to Indiana, and some weeks prior to her commitment to an insane asylum, and at a time when they thought she was insane, she said she wanted to go home to Nebraska, and tried to borrow money from them to go. As against that, a number of new witnesses were introduced by the defendants, to whose testimony we will briefly refer.

J. E. Bowden testified that he lived in the neighborhood where the Browands lived, and attended the auction sale had by the Browands when they were about to leave Nebraska; that he saw both Mr. and Mrs. Browand there; that Mrs. Browand was about the house with the other ladies, and that he noticed nothing out of the ordinary in her conduct; that they sold the property there on the farm, the same as other persons did when leaving. On recall he testified that, when he arrived at the sale, "they were selling furniture on the east side of the house. * * * They were selling quite a lot and did after I came there."

P. H. King testified that he attended the auction sale; that they were selling all their goods at that sale, the same as other people did when they quit farming; that it was a cold day, and he was in the house a good deal, and talked with Mrs. Browand; that she was looking after the wants

of the people in the house and looking after things generally.

Peter Hanson attended the sale. He testified that they were selling out everything on the place.

A. R. Stewart attended the sale. He testified that they were selling the stuff they had on the farm; that it looked like a sale for removal from the farm.

A. E. Behlers testified that he remembered the sale, and of seeing the sale bills that had been posted up; that he herded sheep near the Browand farm, and would go to their well for drinking water; that he knew Mrs. Browand, and talked with her frequently, and did not notice anything out of the ordinary; that after the sale the Browands went away.

A. Emley was an old friend and neighbor of the Browands. He stated that they often exchanged visits; that Mrs. Browand's mental condition seemed good.

James Coleman, 40 years old at the time of the trial, testified that he went to live with the Browands when he was nine years old, with the understanding that they were to adopt him; that Mrs. Browand went to Indiana in 1885, and during her absence of about a month he and Mr. Browand were alone on the farm; that in the spring of 1886 the Browands decided to leave the farm; that they had a sale and sold their furniture and stock and implements at auction; that he tacked up some of the sale bills; that Mrs. Browand was there at the time, and told him more than once that they were going to leave Nebraska for good; that the Browands were talking, for five or six months before they left, about going back to Indiana; that they talked about selling the stock and the farm, but finally decided to rent; that they both stated several times that their intentions were to go there to stay.

Moses Whitcomb testified that he was an old acquaintance and friend of the Browands; that he knew Mrs. Browand in Indiana when she was a little girl; that after they came to Nebraska he visited at their home; that he had a talk with Mrs. Browand before the Browands left for Indiana; he thinks this talk was in the fall of 1884;

that he had quite a talk with her; that Mr. Browand was out milking the cows, and Mrs. Browand came out and sat down on the bench beside him. "I says, 'Mrs. Browand, seems to me that you've quit milking the cows.' She says, 'Yes, sir; I have.' 'Well,' she says, 'that ends it, Mose,' and she says, 'That ends it, Mose,' designating me. 'I am going to go home just as soon as I can and stay with my mother.' He came up then, and as a matter of course there was no more talking about it."

Henry Perrine testified that he was an old neighbor of the Browands; that the families visited back and forth; that he saw them, during the time they were living there, on an average of once a week; that he attended the sale; that at that sale they sold cattle, horses, farm machinery, and household goods; that he helped carry chairs, tables and bedsteads out on the east side of the house; that he bought the heating stove; that Mrs. Browand was there "helping around;" that during the day of the sale he and his wife talked with Mrs. Browand. "My wife says to her as she was going to leave there, she says, 'You will be back in Nebraska,' and she says, 'No; never be back in Nebraska again, never come back again,' that is what she said;" that they left the next day. On cross-examination he was asked: "Is it not a fact Mr. and Mrs. Browand had a sale out there, and Mrs. Browand went back to Indiana, and subsequently Mr. Browand came back and sold the rest of their goods? A. Mr. Browand came back after he went to Indiana; he came to my house and stayed with me. Now, if he sold any goods, I don't know anything about it. Q. You don't know? A. If he did. Q. You don't know whether or not they sold all their furniture at that sale; you wouldn't pretend to state that? A. They might have kept a few relics; I wouldn't pretend to say; I don't know of anything. I know I helped to carry out the tables and chairs and bedsteads, and they had a small house and stoves was out there, and I bought the heating stove."

Mrs. Perrine, wife of the preceding witness, testified that she attended the sale; "Q. What kind of a sale was that? A. All farm implements, cattle, household goods;" that

Mrs. Browand was there. "Q. Do you remember what particular furniture was sold there? A. Not entirely; I know we bought a stove of them, the heating stove, and the rest was all sold, as far as I know. Q. It was all sold that was in the house there? A. Yes, sir. Q. Did you and your husband have a conversation with Mrs. Browand before you left that day? A. I think so. Q. You may state what that conversation was. A. Well, I don't know; we was talking about the sale and about their going away, and in a joking way I says to her, I says, 'Oh pshaw! you will be back to Nebraska again.' She says, 'No; I never will come back here again.'" On cross-examination she was asked: "Q. You don't pretend to state here now that the Browands sold all their furniture at that time? A. As far as I know. Q. You don't know whether they did or didn't? A. Not positively, but I feel sure that they did. Q. Do you know whether or not they had more than one sale? A. They did not to my knowledge. * * * Q. You don't know whether Mrs. Browand was as jocular as you were or not; you don't know what was in her mind, of course, when you said that? A. No, sir; of course not. Q. You were joking with her and she was joking with you? A. She wasn't joking with me; she was in earnest."

In the closing paragraph of our second opinion, 92 Neb. on page 378, reference is made to a claim that had been filed by plaintiff, guardian of Mrs. Browand, for the money derived from the sale of the land, and we there said: "But it is not shown whether the claim was allowed." At the last trial it is shown that Mr. Browand, subsequent to his sale of the land to the defendants, died in Indiana. His personal estate was administered in that state. It consisted chiefly of four certificates of deposit in the bank, aggregating $1,200. The court found that Mrs. Browand was the sole heir of her deceased husband. After the administrator had collected the assets, paid the expenses of administration and sundry items allowed by the court, he reported a balance on hand of $951.34, which he reported should be paid to Mrs. Browand, as the widow and only heir of the decedent; that he had not paid the money to

Mrs. Browand's guardian because of the fact that he had not filed a sufficient bond to entitle him to it. He therefore obtained an order from the court to pay the money to the clerk of the court, to be paid to the guardian when he should furnish a satisfactory bond, and the administrator was discharged. The record of the court, in evidence here, shows the following subsequent entry: "July 7, 1909. Received of Joseph N. Mason, clerk, nine hundred and fifty one and 34/100 ($951.34) dollars, being in full of balance of funds of David C. Browand estate, ordered paid to me, as guardian of Frances Browand, a person of unsound mind and widow of said David C. Browand. (Signed) Lonzo D. Whitford, Guardian." The record also shows that when Mrs. Browand was committed to the asylum the affidavits and evidence upon which the order of commitment was based recited that Mrs. Browand was an inhabitant of Indiana, and the court so found.

With this evidence and these records before the trial judge who had also presided and heard the evidence at the former trial, a general finding was made in favor of the defendants, and a decree entered quieting their title to the land as prayed. This decree is not only supported by the evidence, but is just and equitable from every point of view. The burden cast upon the defendants by our former opinion was sustained. This litigation is being prosecuted by the brothers and sisters of Mrs. Browand, not for her benefit, for they know that she will never leave the asylum until she is carried therefrom to her last resting place. They are prosecuting this suit in their own interests as her heirs, and are seeking to deprive the defendants of $3,700, which they paid for this land, and to compel them to pay for the use of the land since the death of Mr. Browand in 1908. They are doing this, knowing, as we believe, that when Mr. and Mrs. Browand sold all their personal effects and left their farm and returned to Indiana, she to her people and he to his, they had separated as man and wife, and that neither of them ever intended to return to their old Nebraska home. There is no equity in their cause.

At the conclusion of the trial the district court took the case under advisement and gave counsel leave to file briefs. It was held under advisement for about a year, when defendants asked leave to introduce some further testimony. Leave was granted, and it is urged that this was error. We do not think so. Plaintiff did not request further time to enable him to meet the new testimony offered. Hence, there was no abuse of the discretion vested in the court.

The judgment of the district court is right, and it is

AFFIRMED.

HAMER, J., not sitting.

GEORGE H. ROGERS ET AL., APPELLANTS, V. P. JAMES COSGRAVE ET AL., APPELLEES.

FILED JUNE 18, 1915. No. 18111.

1. **Eminent Domain**: GRANT OF RIGHT. Eminent domain is a sovereign power. It belongs to the state, and the state can authorize such corporations as it sees fit to exercise the right in the public interest.

2. ———: ———. The fact that a corporation derives its charter from another state, and so is a citizen of that state within the federal statute authorizing the removal of causes to the federal courts for diverse citizenship, does not prevent it from complying with our statute so as to become a domestic corporation with right of eminent domain.

3. ———: DAMAGES: FAILURE TO AGREE: EVIDENCE. The statute (Rev. St. 1913, sec. 5945) provides that "the damages to be paid by such corporation * * * when not agreed upon, shall be ascertained" by condemnation. If the evidence shows that there have been negotiations for purchasing of the land between the parties which have failed because of certain disagreements, it shows sufficiently that the parties cannot agree.

4. ———: ———: ———: OWNERS IN COMMON. If one of two owners in common of the land fails to agree to sell the same, it is unnecessary to negotiate with the other. It will not be presumed that the company could make satisfactory use of an undivided interest.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Hall & Bishop and *George H. Rogers,* for appellants.

Byron Clark, Jesse L. Root, Strode & Beghtol and *J. W. Weingarten, contra.*

SEDGWICK, J.

The defendant, the Chicago, Burlington & Quincy Railroad Company, made application to the county court of Lancaster county to condemn certain lands owned, as alleged, by George H. Rogers, Isabella Rogers, and Anna Rogers. Thereupon, George H. Rogers and Anna Rogers began this action in the district court for that county against the then county judge, P. James Cosgrave, and commissioners who had been appointed to appraise the lands in question, to restrain further condemnation proceedings. Afterwards the said Anna Rogers died, and George H. Rogers, as executor of her will, was substituted in her place as plaintiff, also the railway company became a party to the proceedings. A temporary injunction was allowed, and upon trial the court found generally for the defendants, and plaintiffs have appealed.

1. It is contended that the railroad company is a foreign corporation, and therefore does not have the right of eminent domain in this state. In *State v. Chicago, B. & Q. R. Co.,* 25 Neb. 156, it was decided that, "by virtue of such consolidation, and the compliance with the laws of this state, the corporation created thereby became a body corporate, pursuant to, and in accordance with, the laws of this state, and was, therefore, not a foreign corporation." The opinion recites the facts of the consolidation, which was effected in 1880, and quotes the statute of 1881 (Laws 1881, ch. 66), which is now Rev. St. 1913, sec. 5963, and held that the consolidation was a compliance with this statute. It then discusses the question whether the compliance with the statute will make it a domestic corporation having the right of eminent domain, and says: "It

was evidently the purpose of the legislature, in the enactment of the law under consideration, that, by complying with its provisions, the corporation so complying should be a domestic, and not a foreign corporation. This being true, it seems to us quite clear that such a consolidation, when effected, would bring the consolidated company, not only within the spirit, but within the letter, of the law and of the constitution. * * * And while not originally incorporated within this state, in the manner in which new corporations are formed, yet 'it would become a body corporate, pursuant to, and in accordance with, the laws of this state.'" Another case was also then decided holding the same view. *State v. Missouri P. R. Co.*, 25 Neb. 164.

The plaintiff argues that, as the statute authorizing such consolidation and conferring the right of eminent domain upon filing the articles of consolidation with the secretary of state was enacted after the consolidation in question took place, such consolidation was not a compliance with the statute. But we cannot presume that this court was ignorant of the time the statute was enacted, and that the court would have decided that the fact that the defendant company had done all of those things required by the act would not entitle it to the benefits of the act because they had already been done when the statute was enacted, especially as this court reached the same conclusion about ten years after the statute was enacted, and quoted *State v. Chicago, B. & Q. R. Co., supra,* as authority for that holding without criticising and without suggesting that the fact that the statute was enacted after the consolidation was worthy of consideration. *Trester v. Missouri P. R. Co.*, 33 Neb. 171. The writer of the opinion in the former case expressed the idea that becoming a domestic corporation under our statute would constitute the defendant a citizen of this state so that it could not remove litigation to the federal courts on the ground of diverse citizenship, but this was not necessary to a determination of the case, and in the latter case the court expressly reserved any opinion on that question. Afterwards the question was decided by the supreme court of the

United States in *St. Louis & S. F. R. Co. v. James,* 161 U. S. 545. The court said: "It must be regarded, to begin with, as finally settled, by repeated decisions of this court, that, for the purpose of jurisdiction in the federal courts, a state corporation is deemed to be indisputably composed of citizens of such state." The opinion then quotes many former decisions of that court to the same effect. It quotes from *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.,* 118 U. S. 290: "The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers." The court then in discussing the matter says: "But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the federal constitution so as to subject it as such to a suit by a citizen of the state of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the state creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation."

Eminent domain is a sovereign power. It belongs to the state, and the state can authorize such persons as it sees fit to exercise the right in the public interest. It is not necessary that a railroad corporation shall be the creature of the state in the sense that its stockholders must be residents in order to enable the state to confer upon it the right of eminent domain. Under the federal statute the stockholders of a corporation are conclusively presumed to be residents of the state from which the corporate ex-

istence is derived, and the corporation is a citizen of that state for the purpose of construing the law giving jurisdiction to the federal courts on the ground of diverse citizenship. But, under the state statute allowing a railroad corporation of another state having connected lines in this state to improve its lines and exercise the right of eminent domain in this state, the residence of its stockholders and the origin of its charter are alike immaterial. Under our statute and the early decisions, this defendant has exercised the right of eminent domain for many years, and the question must be regarded as settled.

2. The plaintiff contends that condemnation proceedings cannot be maintained in this case because it does not appear that the parties cannot agree upon the purchase of the land by the defendant company. The statute provides: "The damages to be paid by such corporation for any real estate taken as aforesaid, when not agreed upon, shall be ascertained and determined by commissioners to be appointed by the county judge." Rev. St. 1913, sec. 5945. "If the owner of any real estate, over which such railroad corporation may desire to locate its road, shall refuse to grant the right of way through his or her premises, the county judge of the county * * * shall, upon the application of either party, direct the sheriff of said county to summon six disinterested freeholders of the county," etc. Section 5946.

The supreme court of Washington appears to hold that no attempt to purchase is necessary when the owners deny and contest the company's right to take the land. *State v. Superior Court*, 48 Wash. 277. Moreover, the records show that there were negotiations between the defendant and George H. Rogers, and that these negotiations failed. If the company could not obtain his interest, it would be useless to try to negotiate with his sister, as the company could not use an undivided half interest in the land.

The objection that the defendant is not attempting to condemn this land for its own use or for any necessary use of the defendant is without merit. Condemnation is authorized by the statute of "so much real estate as may

be necessary for the location, construction and convenient use of its road." Rev. St. 1913, sec. 5940.

There is no allegation in the petition that the proceedings are fraudulent, or not in good faith. The allegation that the defendant does not intend to use the land exclusively, but intends to allow other railroads and corporations and individuals to share in its use, does not state a sufficient reason to deny the application. The condemnation is for the use of the public, and the public generally will share in its use. There is no direct allegation that this land is for the use of some corporation or person who is not entitled to condemn land for public use, and the evidence would not support such allegations.

We have not found any error in the record requiring a reversal, and the judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

CLARA M. BROWN, ADMINISTRATRIX, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 18, 1915. No. 18182.

1. **Master and Servant**: DEFECTIVE APPLIANCES: NOTICE. An employee is not chargeable with notice of defects in the machinery or appliances used in the business, unless the observation and inspection of such machinery or appliances is within the line of his duties, or the defects are obvious.

2. ———: APPLIANCES: DUTY OF MASTER. An employer is bound to exercise reasonable care to furnish his employees with a safe place to work, under the conditions and circumstances of the employment, and the employer is negligent if the employment is rendered unsafe by reason of defects in the machinery or appliances used therein, which defects were known to the employer, or would have been known if he had used reasonable diligence under the circumstances.

3. ———: INJURY TO SERVANT: CONTRIBUTORY NEGLIGENCE. In an action for damages on account of negligence of defendant, the plain-

tiff cannot recover if he himself was also guilty of negligence which contributed to the accident which caused the damage. The burden of proof is upon the defendant to establish contributory negligence on the part of the plaintiff. Such question is peculiarly for the jury, and the verdict thereon will not be disturbed unless clearly wrong.

4. ———: ———: INSTRUCTIONS. In such action for damages alleged to have been caused by a defect in the machinery or appliances furnished by the defendant employer, it is erroneous to instruct the jury that the employer is bound to furnish his employee a safe place to work. The duty of the employer in that regard is to furnish a place to work reasonably safe under all the conditions and circumstances of the employment. But the judgment will not be reversed for such error, if such instruction is immediately followed by a full and correct explanation of the meaning and use of the expression "safe place to work," and it appears from all of the instructions that the jury has not been misled by the error complained of.

5. Appeal: SUFFICIENCY OF EVIDENCE. Upon examination of the evidence indicated in the opinion, it is found that the verdict of the jury upon the several questions of fact is not so clearly unsupported by the evidence as to require a reversal.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

John L. Webster and *W. J. Connell,* for appellant.

William H. Hatteroth and *H. H. Bowes, contra.*

SEDGWICK, J.

Walter T. Brown was a lineman in the service of the defendant company. He, with other linemen, was engaged in placing an additional cable under the Union Pacific bridge over the Missouri river between Omaha and Council Bluffs. While they were working 40 or 50 feet above the ground, Brown fell and was instantly killed. The plaintiff, as administratrix of his estate, brought this action in the district court for Douglas county, alleging that the accident was caused by the negligence of this defendant. She recovered a verdict and judgment, and the defendant has appealed.

The plaintiff alleged in her petition: "That the injuries to and death of said Walter T. Brown were caused by the carelessness and negligence of the defendant, particularly in that (a) the said defendant was negligent and careless in permitting the cable or wire that broke and gave way to be and become old, rusty and worn out; (b) the said defendant failed to furnish a support or scaffold of sufficient strength for the use of said Walter T. Brown while performing his duties as such lineman at the time he fell as aforesaid; (c) the said defendant failed to warn said Walter T. Brown of the unsafe condition of said cable or wire that broke and gave way; (d) the defendant failed to have and maintain under the support, where said Walter T. Brown was working, any scaffold, staging support or other device for the purpose of preventing the said Walter T. Brown from falling to the ground in case of accident to the support on which he was standing while performing his work."

For answer the defendant denied that "the cable upon which Walter T. Brown was situated at the time of the accident described in plaintiff's amended petition broke, or that there was any movement of said cable not reasonably to have been expected by the said Walter T. Brown, and denies that it was negligent or careless in failing to provide proper safety appliances for the said Walter T. Brown, and denies that at the time of said accident said Walter T. Brown was at a place where he was required to be in the performance of his work, or that said Walter T. Brown was directed or required to work in an unsafe place." It also alleged that at the time of the accident the "said Walter T. Brown was crawling along the top of swinging cables between the cross-arms by which said cables were supported. Defendant alleges it was no part of the duties of the said Walter T. Brown at any time to crawl along said cables in the manner above described; that said Walter T. Brown had been forbidden by the defendant to go onto and along said cables, and said Walter T. Brown was given positive and explicit orders not to travel over or go upon said cables between crossarms; that

said Walter T. Brown was possessed of ample experience and knowledge of his work to fully apprize him of the danger in so doing. Defendant further alleges that, notwithstanding repeated admonitions given by the defendant as above set forth, and although a safe method existed for traveling between the crossarms upon which said Walter T. Brown was engaged in working, said Walter T. Brown carelessly, negligently, and wilfully, and recklessly crawled out upon said cables in the manner aforesaid. Further answering, defendant alleges that Walter T. Brown was provided with a belt such as is used by linemen for their protection while engaged in work of the character of that in which the said Walter T. Brown was engaged at the time of the accident; that said belt was good and sufficient protection to Walter T. Brown in pursuance of his said duties; that said Walter T. Brown had been directed to use said belt when engaged in said work; that the said Walter T. Brown was perfectly familiar with the use of said belt; and that at the time said Walter T. Brown was injured the use of the safety belt was necessary and practicable; that said Walter T. Brown carelessly, negligently and wilfully failed to use said safety device, thereby causing the injuries complained of, although said safety device would at said time and place have been good and sufficient protection to the said Walter T. Brown, had he obeyed instructions concerning the use thereof."

The defendant denied the plaintiff's allegations of negligence on the part of defendant. The defendant's allegations of contributory negligence were denied by the plaintiff.

1. The first serious question presented is whether the evidence is sufficient to justify the finding of negligence on the part of the defendant which was the proximate cause of the accident. There were several cables already in place a few inches apart on oak crossarms. It was the custom of these linemen to stand or sit upon these cables while "tying in" another; that is, fastening another cable near them upon the same crossarm. Mr. Potter, another lineman, was working upon this cable, fastening it at an-

other crossarm 40 or 50 feet from the crossarm where the deceased was or had been at work. He was sitting upon the cables. When the guy wire broke, the cable "broke loose from the insulation," and there was such a disturbance of the cable on which he was sitting that it was with difficulty that he saved himself from falling. Near the place where these men were working the cable turned to the side and downward to reach to the power house. The purpose of the guy wire was "to hold the strain to keep the slack from pulling around the short corner of the two crossarms. * * * They are not supposed" to hold the weight of a man, but "do, though, lots of times." If the deceased was relying upon this cable, as Potter was, the movement of the cable was sufficient to cause his fall. Any weight on the cable "would have the effect of putting a strain" on the guy wire. The defendant, of course, knew that the linemen relied upon the cables as they did. The guy wires were evidently supposed to have sufficient strength to resist this strain. The guy wire had been in position for several years. "One end of it was very rusty. In fact, it was rusted entirely at one end." The evidence justifies the finding that the guy wire was defective. At this point the defendant suggests that the linemen should have known this; that it was their duty to report any such defect. It would seem to be the duty of any employee of the company to report such a condition if observed. But the proper inspection of these wires is of so much importance that it might be made the special duty of competent men. The break in this wire was at some distance from the crossarm at which this lineman was supposed to work, the condition of the wire was not observable from the position of the deceased, and the evidence is not so clear that he ought to have known the condition of this wire as to admit of no other conclusion. On the other hand, the evidence will support the finding that the defendant might, and ought to, have known that this wire was insufficient to support the strain that might reasonably be expected to be put upon it. The witnesses, as to plan and arrangement of these complicated wires, supports and appurte-

nances, were mostly linemen familiar with their work, but not experts in planning or explaining these things. There are photographs and blueprints in the record that are curious and somewhat instructive to ordinary men, but would no doubt be more interesting to experts. Under these circumstances it may be that the jury failed to get a full understanding of the situation. It is doubtful whether the court is more competent. And with some hesitation we conclude that we ought not to reject the findings of the jury that the defendant was negligent in allowing this guy wire to remain in this condition, and that this negligence was a proximate cause of the injury.

2. Another difficult question presented is as to the allegations of contributory negligence on the part of the plaintiff. The place where deceased fell was from 20 to 40 feet to the east of the crossarm upon which he was supposed to be at work. When he had finished his work at that crossarm, he was expected to go down a ladder or "lattice work" to a safe crossing place and proceed to ladders reaching to the second crossarm. The work at the intermediate crossarm was being done by other linemen. The defendant alleges that the deceased, instead of pursuing this safe way, was attempting to "crawl" along the cables to the second crossarm, a distance of something more than 100 feet, and past the station where the other linemen were at work. No witness testifies that the deceased was attempting to do this. But the fact that he had probably finished the work where he was, and especially the fact that his body fell so far from directly below the place he was or had been working, are urged as sufficient evidence that he was attempting to cross over on the cables. Defendant's counsel, on cross-examination, asked a witness of plaintiff whether there were "any obstructions or crossbeams or bars to prevent or in any way interfere with his body falling straight down, perpendicularly." The witness answered: "I couldn't say in regard to that, but I think not." By consent of parties that part of the answer, "I think not," was stricken out as "not proper cross-examination, and calling for the conclusion of the witness."

Judging from the complication of "obstructions, crossbeams and bars" shown in the photographs, it would seem that, without evidence that there were no obstructions, and that the body must have fallen directly to the ground, the evidence is not conclusive that the deceased was attempting to cross over on the cables, especially since his next work would be at the second crossarm, and he would have to pass the linemen working at the intermediate station. The jury have found that the defendant's evidence upon this point is not sufficient, and it is not so conclusive as to require us to reject that finding.

3. The deceased was provided with a life belt, which was fastened around his person, and could have been so attached to a cable or other support as to have prevented his fall. But the evidence comes far short of establishing that he was so situated that he could, and ought, if exercising reasonable care, avail himself of that means of safety. We cannot say from this evidence whether he was still at work "tying in the cable," or had finished that and was preparing to go down.

4. One of the court's instructions to the jury was: "It is the duty of the employer to furnish to his workmen a safe place to work, and it is the duty of the employer to inform him of all latent dangers connected with the employment, and, where the place and kind of work to be performed is hazardous and dangerous, to furnish said employees with a safe place in which to perform that work. If you believe from the evidence that the guy wire was not safe, and that Walter T. Brown was required to work on the feeder cable, which was supported in part by the guy wire and that said guy wire had been in that position for four years, and was rusted and frazzled at the end, and that defendant knew of this condition, or, by the exercise of ordinary care, could have known of it, then you are instructed that it was negligence in the defendant in not finding out whether or not the said guy wire was safe, and negligence on the part of defendant to instruct Brown to work in a position where he would necessarily have to place part of his weight upon said feeder cable to which said guy wire was

attached, and the plaintiff would be entitled to recover in this case, unless you find from the evidence that said Walter T. Brown was guilty of negligence which directly contributed to the injury complained of."

This instruction was clearly erroneous, and was especially dangerous in a case of this kind. It is impossible that linemen employed as these men were can have a place to work that is absolutely safe. If it is reasonably safe, considering all of the circumstances and the nature of the employment, that is all that can be demanded. But this instruction repeats the statement that the employee is entitled to a safe place. While the word "safe" will not admit of comparison, still the idea of safety is always comparative. There is no such thing as absolute safety in this world. If the instructions of the court, taken all together, make so plain the sense in which the word safe is used in the instruction quoted that the jury would not probably be misled thereby, the error is without prejudice. The only questions of negligence on the part of the defendant which the court submitted to the jury were as to this guy wire, its breaking, and its consequences. All other questions of defendant's negligence were determined by the court. The main part of the instruction tends to show in what sense the word is used, and the court also told the jury: "You are instructed that the defendant was not an insurer of the safety of Walter T. Brown while he was engaged as a lineman and doing the usual work of a lineman. * * * If you find from the evidence in this case that any defect in the stay wire that broke at the place where it broke was a latent or hidden defect not known to defendant, and that could not reasonably have been discovered or known to it in the exercise of ordinary care, no liability would exist in this case on the part of said defendant by reason of the fact that said stay wire broke." The jury must have considered that, if the evidence showed that the defendant had done the things so plainly specified in these instructions, it had furnished the plaintiff with a safe place to work, within the meaning of that word as used in the instruction complained of.

Other instructions are criticised, but, taken as a whole, we cannot say that they were erroneous to the prejudice of defendant. We cannot extend this opinion, already too long, for a detailed discussion of them.

The questions involved in this case have presented unusual difficulties, and perhaps they are not free from doubt. Our conclusion is that there is no such prejudicial error, and the verdict is not so clearly wrong, as to require a reversal. The judgment is

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

EDWARD A. SMITH, APPELLANT, V. DOUGLAS COUNTY AGRICULTURAL SOCIETY ET AL., APPELLEES.

FILED JUNE 18, 1915. No. 18585.

1. **Counties: ALLOWANCE OF CLAIMS: APPEAL.** An order of the county commissioners allowing the claim of an agricultural society for county aid under the statute is appealable.
2. **Constitutional Law: LEGISLATIVE ACT: TITLE.** The subject of legislation must be clearly expressed in the title of the act. The act of the legislature (Laws 1913, ch. 165), which attempts to increase the amount to be donated by a county to an agricultural society from three cents per inhabitant of the county to five cents without the limitation expressed in the title that such aid "shall not exceed the amount annually paid by such society for premiums other than speed," is in violation of section 11, art. III of the Constitution, and is void.
3. **Appeal: PRACTICE: REVIEW.** Technical questions of practice before the county commissioners which were not presented to the district court will not be considered here.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed with directions.*

E. A. Smith and *T. E. Brady*, for appellant.

George A. Magney and *Charles Haffke, contra.*

SEDGWICK, J.

The Douglas County Agricultural Society applied to the county commissioners of that county for a warrant under the provisions of chapter 165, Laws 1913 (Rev. St. 1913, sec. 6). The county commissioners allowed the claim in the sum of $7,326.50, and an appeal was taken to the district court by Edward A. Smith, as a taxpayer of that county. Upon trial in the district court, the action of the county commissioners was affirmed, and Mr. Smith, as a taxpayer, has appealed to this court.

1. It is first objected that no appeal lies in such case from the action of the county board. This question was presented to the district court upon a stipulation of facts which recited: "The county commissioners of Douglas county, Nebraska, allowed the claim of the said agricultural society in the sum of $7,326.50, for which a warrant was drawn in favor of said Douglas County Agricultural Society." Such decision of the county board is appealable.

2. The stipulation was that at the November election, 1912, of a member of congress for that district there were cast in Douglas county 29,306 votes. On the basis of five inhabitants for each voter, as the section quoted provides, and allowing five cents for each inhabitant, the court found the amount due the society under that statute to be as before stated. It is objected that the said act of 1913 is invalid, because the act is broader than the title.

The act of 1913 purports to amend the former statute, section 3019, Ann. St. 1911. That section provided for the donation by the county of the sum of three cents for each inhabitant of the county. The new act increased this to five cents for each inhabitant. The title contained the limitation "that said county aid shall not exceed the amount actually paid by such society for premiums other than speed." The court allowed the five cents per inhabitant provided for in the body of the act without the limitation indicated in the title. If the act had been limited as stated in the title, the amount allowed under this evidence would have been $4,092, instead of $7,326.50. By section

11, art. III of the Constitution, which has been so often construed by this court, the subject of legislation must be clearly expressed in the title. The object is to prevent surreptitious legislation. The members of the legislature and the public interested are notified by the title what legislation is intended. The amendment by which the donation is so largely increased is by the title of the act conditioned upon the amount of premiums, other than for speed, which are paid by the society. The act which increases the donation absolutely is, of course, broader than the title, which allows such increase only if the amount is actually paid out in premiums. "Where the language employed in the title is such as would lead a reasonable man to suppose that the legislature intended to restrict the scope of the act within certain limits specified in the title, such act is unconstitutional so far as concerns any provisions outside the limits thus marked out, even though such provisions might properly have been included in the act under a broader title." 26 Am. & Eng. Ency. Law (2d ed.) p. 590. This court has frequently declared that an act of the legislature will not be declared void, unless it is so clearly in violation of the constitution that no other conclusion is admissible. If an act which increases the amount of donation of the public money can omit and disregard that part of the title which places a limitation upon the amount so donated, the evil which the constitutional provision in question seeks to prevent is encouraged in its most dangerous form. The increase of the amount of the donation within the limits specified in the title was the inducement, in fact the only purpose, of the amendment. It follows that the act is invalid for any purpose, and the court should have proceeded under the former statute.

Several technical questions of practice are suggested in the brief. They were not presented to the district court in the petition there filed by this appellant, and are therefore not considered here.

The judgment of the district court is reversed and the cause remanded, with instructions to enter judgment in

favor of the agricultural society upon the basis of three cents for each inhabitant of the county, estimating five inhabitants for each elector voting for member of congress at the 1912 election.

REVERSED.

HAMER, J., not sitting.

JESSIE E. BOLTON, APPELLANT, V. HENRY BOLTON; WILLIAM M. CAIN ET AL., APPELLEES.

FILED SEPTEMBER 20, 1915. No. 18924.

Divorce: APPEAL: ATTORNEY'S FEES. In a matter concerning the compensation of attorneys engaged in the trial of divorce cases appealed to this court, the supreme court is at liberty to exercise its own judgment and discretion, as well as to avail itself of the estimates placed by experts upon the value of the services.

APPEAL from the district court for Colfax county: GEORGE H. THOMAS, JUDGE. *Modified, and remanded with directions.*

Burkett, Wilson & Brown, for appellant.

A. M. Post, Cain & Mapes and *M. F. Harrington, contra.*

PER CURIAM.

This is a proceeding asking the district court to adjust and allow the amount of compensation to respondents Cain and Harrington for their services as attorneys in this case in the district and supreme courts.

In the district court the testimony of a number of witnesses belonging to the legal profession was taken as to their opinion of the fair and reasonable value of the services performed. As was to be expected, there was a radi-

cal difference in these estimates. In a matter concerning the compensation of attorneys engaged in the trial of divorce cases appealed to this court, the supreme court is at liberty to exercise its own judgment and discretion, as well as to avail itself of the estimates placed by experts upon the value of the services.

After considering the record in the case, the testimony as to the amount of labor performed, and expenses incurred, and the opinions of the several witnesses, we have come to the conclusion that the compensation awarded respondents by the district court should be reduced. The amount allowed respondent Cain is reduced in the sum of $594.83, and the amount allowed respondent Harrington is reduced in the sum of $250. Each is required to pay the clerk of the district court, within 40 days, the difference between the amounts thus fixed and the amounts withdrawn by each under his attorney's lien, and the district court is directed to enter judgment accordingly.

Modified, and remanded, with directions to enter judgment in accordance with this opinion.

JUDGMENT ACCORDINGLY.

J. G. CHERRY COMPANY, APPELLANT, V. CHARLES A. HELM ET AL., APPELLEES.

FILED SEPTEMBER 20, 1915. No. 18159.

Creditors' Suit: PROPERTY SUBJECT. Property conveyed by a debtor in consideration of an agreement for his future support may be subjected to the payment of a judgment, where there is no other means of enforcing payment, to the extent that the value of the property exceeds the amount of support actually furnished by the grantee in good faith.

APPEAL from the district court for York county: GEORGE F. CORCORAN, JUDGE. *Reversed with directions.*

George W. France, for appellant.

W. L. Kirkpatrick, contra.

MORRISSEY, C. J.

November 3, 1910, defendant Helm and his invalid wife came from South Dakota and took up their residence at York, Nebraska, with defendant Lawson, their foster son. Helm bought a five-acre tract of land adjoining the property of Lawson, and commenced the erection of a house, with the intention of residing therein, but Mrs. Helm died, April 14, 1911, while they were still living in the Lawson home. In the early winter Helm fell, sustaining severe injuries, and was confined to his bed for a considerable time. Lawson and his wife nursed and cared for Mr. and Mrs. Helm as they would for natural parents, and, after the death of his wife, Helm proposed to Lawson that he deed Lawson the property heretofore mentioned as compensation for the service rendered in caring for himself and his deceased wife, and the further consideration of an oral agreement whereby Lawson agreed to maintain and support Helm and give him a suitable home during Helm's lifetime. The property is claimed by plaintiff to be worth $6,500, and is admitted in the answer of Lawson to be worth $5,000. It is undisputed that Helm had no children except this foster son; that he was then advanced in years, and somewhat crippled by reason of the fall he had received during the winter; and that he had no other property except the real estate herein involved. The deed to the premises was made and recorded June 27, 1911.

Before coming to live with his foster son, Helm had been employed by the plaintiff, and there was an unsettled account between them. Plaintiff sent this account to an attorney at York, who received it, July 8, 1911, and immediately took steps to make the collection. Helm denied that he was indebted to plaintiff and refused to pay. The attorney then called on Lawson, but payment was not made, and, July 20, 1911, suit was instituted, which resulted in judgment in favor of plaintiff for $437 and costs taxed at $20.90. Execution was issued and returned *nulla bona,* and this action was brought in the district court for

York county to set aside the deed of conveyance and subject the real estate to the payment of this judgment.

There is no dispute as to the facts. While it is alleged that the deed was made for the purpose of defrauding creditors of Charles A. Helm, yet we think the proof fails to show any fraudulent intent on the part of either Helm or Lawson. However, the direct effect of the transfer was to prevent the plaintiff from collecting its judgment, and, to that extent, it may be said to be a constructive fraud. Helm was indebted to Lawson for the care and support given himself and wife, but the exact amount is not shown. There is enough testimony in the record on this point, however, to indicate that the amount does not exceed one-fourth the value of the property conveyed, and, if this judgment is made a lien against the property, Lawson will still be left an equity worth much more than the amount actually due from Helm. The greater part of the consideration for this conveyance consisted of an agreement for future support of the grantor. The weight of authority is to the effect that it is the legal duty of a debtor to pay his debts before he can convey property to provide for his future support, and that existing creditors may avail themselves of property conveyed for future support, when the debtor has no other property out of which payment can be enforced. *Harris v. Brink*, 100 Ia. 366; *Walker v. Cady*, 106 Mich. 21; *Henry v. Hinman*, 25 Minn. 199; *Gaar, Scott & Co. v. Hart*, 77 Ia. 597.

Applying this rule to the facts of this case, it is apparent that plaintiff is entitled to have this property subjected to the payment of its judgment, and the cause is reversed and remanded, with directions to enter a decree establishing the judgment in suit as a first lien on the real estate.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

FREDERICK SCHNEIDER, APPELLEE, V. JOSEPH C. REEVES, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18173.

Landlord and Tenant: LEASE: BREACH: DAMAGES. Upon a breach on the part of the lessor of real estate of a condition in a lease, whereby the lessee suffers partial disturbance and interruption of the quiet enjoyment of the demised premises, the lessee is entitled to recover such damages as are the natural and direct consequence of such breach.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

B. N. Robertson, for appellant.

McKenzie & Cox, contra.

MORRISSEY, C. J.

Defendant, Reeves, was the owner of farm lands in Douglas county, and it is alleged that, on or about March 1, 1911, he made an oral lease to certain of these lands to plaintiff. The lands thus leased lay away from the public highway, and the only means of ingress or egress was over other land owned by defendant. It is alleged that defendant in making the lease agreed to furnish plaintiff the use of a private roadway leading from the land so leased to the public highway. Plaintiff had leased these same premises from defendant before, and for several years had been in their possession and used this way across the other land of the defendant. The lands so crossed were leased by defendant to plaintiff's brother, Herman. During the summer of 1911 the brothers quarreled, and Herman so obstructed this road or way that plaintiff was deprived of its use from July 2 to August 9. He brought this action against the landlord, alleging a breach of his contract to keep the way open, and alleged that, in order to obtain access to the public highway, he was compelled to travel over another route; that he was engaged in farm-

ing other lands, and that because this road was closed he was obliged to travel an additional 18 miles daily to reach the other land which he was then farming and cultivating; and that he otherwise suffered damages; and he prayed judgment in the sum of $1,000.

Defendant admitted leasing the premises occupied by plaintiff, and that there was a roadway, such as alleged, by which the land was reached, but alleged that, in March, 1911, he leased the land over which this roadway ran to Herman Schneider, a brother of plaintiff, and that Herman went into possession and has since had the sole and exclusive possession thereof, and was in the possession at the time of the obstruction of the road; that the road is guarded by gates; and that plaintiff failed to properly close the gates when going through; and denied all other allegations of the petition. There was a trial to a jury, with a verdict in favor of plaintiff for $150, and defendant has appealed.

The errors complained of relate to instructions given by the trial court. The first told the jury that if they found plaintiff had a lease over this right of way, it was the duty of defendant to keep it open so that plaintiff could pass over it; and, if he did not keep it open and in such condition that plaintiff could pass over it, the verdict should be for plaintiff. If the defendant had leased the land over which the right of way was laid to Herman, and had expressly reserved in the lease the right of plaintiff to use the way, and Herman, without the knowledge or consent of the defendant, had quarreled with the plaintiff and prevented his using the way, defendant would not be liable for the conduct of Herman. The answer, however, admits that defendant leased the land to Herman, without any allegation that he reserved or mentioned the plaintiff's right of way. Herman, then, as against the defendant, was entitled to the land without any right of way across it, and it was defendant's own fault that the trouble arose between Herman and the plaintiff.

The next instruction complained of relates to the opening and closing of the gates mentioned in defendant's an-

swer, and, when read in connection with the pleadings and the evidence, it cannot be said that defendant was prejudiced by this instruction. Perhaps it might have been omitted altogether, but, if it was erroneously given, it was error without prejudice to the defendant.

Finally, complaint is made of the measure of damages. Defendant, in briefing the case, has sought to avoid liability by pointing out that, whatever the disturbance of plaintiff's use of this roadway, defendant was not liable because the obstruction was placed by the tenant, Herman Schneider; but by his answer he alleges that he leased these premises to Herman Schneider and put him in possession. It follows, then, that if plaintiff has proved the allegations of his petition, which were that he had a lease for the use of this roadway, defendant must be responsible for the breach of his contract with plaintiff, who was entitled to its quiet enjoyment, as well as the other ground leased.

Jones, Landlord and Tenant, sec. 369, says: "In a case of partial disturbance and interruption, the law fixes no precise rule of damages." This is a case of partial disturbance and interruption of the quiet enjoyment of the demised premises. "The tenant may recover as special damages any expenses he may have been put to which were the natural and direct consequences of the breach of the covenant of quiet enjoyment. * * * Where the premises were occupied by him as grazing land for his cattle, he may recover as special damages the cost and expense of keeping his cattle on common land while diligently seeking to lease new pasture for them." 2 Underhill, Landlord and Tenant, sec. 432. The court allowed plaintiff to recover for the necessary extra time spent in going the long way from the premises he occupied to the premises he was farming, and for the loss of the use of the pasture on the other farm he had leased during the time this road was closed. No complaint is made of the amount of the recovery, or the insufficiency of the evidence to sustain the verdict.

Taking the case as it stands, we find no error, and the judgment of the district court is

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

HAVENS-WHITE COAL COMPANY, APPELLANT, V. BANK OF RULO ET AL., APPELLEES.

FILED SEPTEMBER 20, 1915. No. 18194.

New Trial: MOTION: TIME. When a jury is waived and a cause tried to the court, a motion for a new trial, not coming within the exception provided by statute for extension of time for filing, comes too late, if filed more than three days after the decision of the court is rendered, and such motion may be overruled by the trial court for that reason.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Crofoot & Scott, R. C. James and *W. C. Fraser,* for appellant.

James E. Leyda and *C. F. Reavis, contra.*

MORRISSEY, C. J.

This action was brought to recover $77.85, the amount of a check drawn by S. O. Briggs and made payable to plaintiff in settlement of a balance due on account. Trial was had June 2, and the following journal entries appear:

"June 3, 1913, court finds for the defendant, to which plaintiff excepts.

"June 6, 1913, court enters judgment on findings. Plaintiff's cause of action dismissed at his costs.

"On June 21, 1913, it being one of the days of said term, and all parties being present, a motion for a new trial was overruled, to which plaintiff excepts; 40 days from the rising of court allowed to prepare and present bill of exceptions."

The motion for a new trial was filed June 9, 1911. Appellees point out the provisions of sections 316 of the Code fixing the time for filing a motion for a new trial, namely: "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and * * * shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." The decision was rendered June 3; the motion filed June 9. More than three days had elapsed between the rendition of the decision and the filing of the motion. No effort is made to show that appellant was unavoidably prevented from filing the motion within the time. In *Nebraska Nat. Bank v. Pennock,* 59 Neb. 61, in discussing this provision of the Code, it is said: "Except for the causes enumerated in the foregoing section a motion for a new trial must be filed within three days after the entry of the decision or verdict. The provisions of the statute are not directory merely, but are wholly mandatory, and a motion for a new trial filed out of time is of no avail and cannot be considered." This question is again discussed in *Ames v. Parrott,* 61 Neb. 847, 857, where Commissioner Pound says: "The findings of the court were its 'verdict or decision' within the meaning of the Code." But in that case he found the motion was filed within the time. "A motion for a new trial, filed out of time and not coming within any of the exceptions of the statute, is of no avail for the purposes of a review of errors in this court." *Carmack v. Erdenberger,* 77 Neb. 592. The grounds urged by appellant for a reversal of this judgment are all based upon the ruling of the court upon the motion for a new trial. The motion having been filed out of time, it was properly overruled.

An examination of the pleadings shows that they are sufficient to sustain the judgment, and it is therefore

AFFIRMED.

HAMER, J., not sitting.

STATE, EX REL. J. F. REA, APPELLEE, V. CITY COUNCIL OF CITY OF LINCOLN, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18861.

1. **Mandamus: PARTIES.** Fire protection in a city is a matter of public interest affecting the rights of all citizens and taxpayers of such city; and, where the duly constituted officers of the city fail to execute the laws relating thereto, an action to compel execution of the same may be instituted and maintained by a citizen of the city in his individual capacity.
2. **Municipal Corporations: FIREMEN: HOURS OF SERVICE.** The provisions of section 4439, Rev. St. 1913, providing, "No fireman, other than the chief and assistant chief of the fire department, shall be compelled or required to be on duty more than twelve hours continuously in any one day, * * * and the proper officers having charge of the fire department * * * are required to make suitable rules and regulations to carry these provisions into effect," are mandatory, and the officers charged with the duty of carrying them into effect are not free to exercise any discretion in that regard.
3. ———: ———: **VALIDITY OF STATUTE.** Chapter 7, Laws 1913, amending section 8057, Ann. St. 1911, is a valid enactment, binding upon all cities of the state having more than 40,000 and less than 100,000 inhabitants.
4. ———: ———: **EVIDENCE: JUDICIAL NOTICE.** Courts will take judicial notice of the different class of service rendered by the fire chief and his assistant from that rendered by the other officers of the department, and a statute will not be held to be special legislation and in contravention of section 15, art. III of the Constitution, because they are placed in different classes.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Fred C. Foster and *D. H. McClenahan,* for appellant.

J. L Caldwell and *Roscoe C. Ozman, contra.*

MORRISSEY, C. J.

The relator, a citizen and taxpayer of the city of Lincoln, a city of the first class having more than 40,000 and

less than 100,000 inhabitants, instituted mandamus proceedings in the district court for Lancaster county to compel the city council to install what is commonly known as the "double shift" for firemen, as provided by section 4439, Rev. St. 1913. It is alleged that, notwithstanding the provisions of the statute, the city council neglected and failed to make suitable rules and regulations for carrying the provisions of the statute into effect. Many allegations are also contained relating to the condition of the funds, *et cetera;* but these we regard as mere surplusage, and not going to the merits of the controversy. An alternative writ was issued. Respondents filed a showing why a writ should not issue, alleging that relator had not sufficient capacity to maintain the action; that the motion and affidavit do not state facts sufficient to sustain a cause of action; that the city did not have funds available for said purpose; and alleged that to install the double shift would seriously impair the protection of the city of Lincoln against fire; and challenged the constitutionality of the act relied upon. The court found generally in favor of relator, and issued a peremptory writ directing the respondents to carry out the provisions of the statute and provide for the "double shift."

Appellants contend that relator did not have capacity to maintain the action. In *State v. City of Kearney,* 25 Neb. 262, this court said: "The rule that, when the question presented is one of public right, and the object of the action is to enforce the performance of a public duty, it is sufficient for the relator to show that he is a citizen, and as such is interested in the execution of the laws, applies more particularly to cases where the failure to perform the duty affects all the members of the community alike."

The matter of fire protection being a matter in which all members of the community are interested, it follows that all citizens and taxpayers within the city have an interest in the equipment and management of the fire department, and, the relator having shown that he is a citizen and taxpayer, this assignment of error is not well taken.

It is insisted that the city council cannot be compelled by mandamus to perform an act beyond its power, and that mandamus does not lie to compel an act of discretion. These propositions are not debatable; but the statute invoked lays down a simple duty, namely, to adopt rules and regulations for the government of the fire department, and to provide that no fireman, except the chief and assistant chief, shall be required to work more than twelve hours continuously in any one day, etc. As to the adoption of this rule, the statute is mandatory, and the respondent is not free to exercise discretion.

The statute relied on is an amendment of an older statute, and one that was in force before the city of Lincoln adopted the commission form of government. When the amendment was adopted no reference was made to any of the sections of the statute bringing about this change in the form of government, and it is contended by respondent that, because of the adoption of the commission form of government by the respondent, the section amended does not apply to the city of Lincoln. This assignment is not well taken. When, by the adoption of the provisions of the Banning Act, the city changed its form of government, it still remained subject to the statutes applicable to cities of its class, not only as they then existed, but subject to such changes and amendments as future legislatures might make. The section amended is the only one dealing with the question of a fire department, and in providing for the "double shift" for firemen it was the only section necessary to amend.

Again, we are asked to hold that the statute is special and class legislation, because it exempts the chief and assistant chief from its provisions, and that it is therefore void. There seems to be good reason for dividing the fire department into classes, placing the chief and his assistant in one class, and the men who do the manual labor in another class. There may be, and undoubtedly is, good reason for this classification, and, as the legislation is uniform as to the class sought to be affected, it cannot be said to come within the inhibition of the constitution.

It follows that the judgment of the district court is right, and is

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

CHARLES L. WOLF, APPELLEE, V. H. CLAY VANNOY ET AL., APPELLANTS.

FILED SEPTEMBER 20, 1915. No. 18221.

1. **Parent and Child: ENTICEMENT: WAIVER.** Where a minor has voluntarily left home and sought an asylum with his sister and her husband, and the father notifies his son-in-law in writing that if he harbors the minor he will claim his wages at a sum named in the notice, such notice is a waiver of the right of the father to maintain an action in tort for damages for enticing the son away and depriving him of his services and companionship.
2. ———: ———: **DAMAGES.** In such case, the measure of recovery is the reasonable value of the services of the minor, and, in any event, should not exceed the amount specified in the notice.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Berge & McCarty and *Burr, Greene & Greene,* for appellants.

R. H. Hagelin, contra.

BARNES, J.

Action to recover damages for enticing away plaintiff's minor son and for the wages of the minor. A trial in the district court for Lancaster county resulted in a verdict for plaintiff for $855, on which the court rendered judgment, and the defendants have appealed.

It appears that the plaintiff and the defendant Clay Vannoy both reside near Waverly, in Lancaster county, and the defendant Pearl Vannoy lives at Archer, in Merrick county; that Pearl Vannoy is the husband of the

plaintiff's daughter. The evidence shows that in May, 1910, the plaintiff sent his two minor sons to visit with their sister at the home of the defendant Pearl Vannoy, in Merrick county; that they remained there about two weeks, when one of the boys returned to his father, while the other boy, Harry by name, remained at his sister's place. In a few days the plaintiff went to Archer, and brought Harry home with him. When he arrived at Archer, he found the defendant Clay Vannoy at the home of his son, Pearl Vannoy, where he had arrived the day before for a visit. So far as the evidence shows, there was no difficulty between the parties at all, and they all went to a picture show in town the evening of plaintiff's arrival. The next day plaintiff and his son Harry left for Waverly. In a short time Harry, without consulting his father, left home and returned to Merrick county, where he remained from the 11th day of July, 1910, until the 2d day of February, 1911, at which time the plaintiff again brought him home. Meanwhile, on the 13th day of August, 1910, plaintiff served a notice in writing on each of the defendants, which notice reads as follows:

"July 13, 1910. Mr. Clay Vannoy, Prairie Home, Nebraska. Dear Sir: Mr. Wolf of Waverly, Nebraska, the father of Harry Wolf, instructs me, in his behalf, to notify you that Harry Wolf, his son, is a minor and under exclusive custody and control of his father. You are further notified that his father will demand the sum of $22.50 per month for his services in case of his employment by you or any one else, and the sum will be payable to the father, and no one has authority to pay any part of said wages to the son, Harry Wolf. Respectfully yours, Justice of the Peace."

The notice to Pearl Vannoy was addressed to him, and was in the exact language of the one above quoted. After Harry left the home of Pearl Vannoy and his wife, and returned to the home of his father, this action was commenced. By plaintiff's petition he sought to recover the sum of $25 a month for Harry's wages while he was living away from home, his expenses incurred in returning Harry

to his home, together with the damages, which he alleged he had sustained by being deprived of the companionship of his son. The total amount sued for was $6,000.

The testimony in this case is conflicting. Plaintiff's son was the only witness who testified that the defendants induced him to remain away from home and take employment from the defendant Pearl Vannoy. He testified, in substance, that Clay Vannoy told him not to go back home, and he would see that he was not sent to the reform school, and that, if he stayed and worked for him until he was 21 years old, he would give him a span of mules. He also testified that Pearl Vannoy wanted him to stay and work for him. The defendant Clay Vannoy testified that he never made any representations to Harry that he would give him a span of mules if he stayed and worked for him until he was 21 years old; that he never had any conversation with him of any kind which would be an inducement for him to leave home; and that he never furnished him any money for that purpose. The utter lack of any motive on the part of Clay Vannoy to induce the boy to remain away from home would seem to stamp his testimony with the element of truth. Mamie Vannoy, who is Harry's sister and the wife of Pearl Vannoy, testified that Harry did not want to return home, and for that reason, and that alone, she permitted him to stay at their home in Merrick county. It is not our purpose, however, to pass upon the sufficiency of the evidence. It was somewhat conflicting, and the credibility of the witnesses was a question for the jury.

As we view the case, however, when the plaintiff notified the defendants that if they harbored his son Harry he would claim his wages, and that no one was authorized to receive payment of the same except himself, he gave them to understand the extent of his claim, and waived the question of tort. He, in effect, said that if they employed his son he would require them to pay him $22.50 a month as his wages. The burden of proof was upon the father to show that the son was induced to leave his services and control at the request of the defendants, and if, as stated

by Mamie Vannoy, he left his father voluntarily, and chose to remain with her and her husband in Merrick county, an action for tort would not lie. *Kenney v. Baltimore & O. R. Co.*, 101 Md. 490, 1 L. R. A. n. s. 205; Wood, Master and Servant, sec. 15. In 29 Cyc. 1679, it is said: "A parent's election to sue for the child's wages is a waiver of the tort and bars his right to recover for enticing the child away." *Thompson v. Howard*, 31 Mich. 309, and *Hopf v. United States Baking Co.*, 27 N. Y. Supp. 217, support this rule.

The defendants requested the court to instruct the jury as follows: "You are instructed that, while one may not interfere with the custody or government of parents, the law does not require that all instincts of humanity and good impulses be stilled. One has no right to encourage a child in disobedience, or assist a child in keeping away from the home of the parent, but it is not the duty of one to expel from his door a child that has, without assistance or encouragement, sought an asylum." This request was refused. In the light of the testimony of Mamie Vannoy, we think this instruction should have been given.

It further appears that the court instructed the jury, upon his own motion, as follows: "You are instructed that it is no defense to this action that some person other than plaintiff aided said minor to leave his home; that the testimony relating to some other person aiding him to leave his home was admitted solely for the purpose of affecting the credibility of the witness." It is our opinion that the court erred in giving this instruction. There was testimony tending to show that Harry's stepmother aided him to leave his father's home, and, if the testimony of the defendants' witnesses was true, the fact that his sister merely gave him an asylum at her home in Merrick county would, under the circumstances, have been a defense to the plaintiff's action.

The trial court further instructed the jury that if they found for the plaintiff they should award him damages for the loss of the son's wages, for defendants' tort in inducing and enticing him away from the custody of his father, the

expense that the father incurred in reclaiming him, and for the injury the father sustained in the loss of the companionship and society of the son. As we view the record in this case, the plaintiff should not have been allowed to recover anything other than the reasonable value of the services of his son, which should not exceed the amount fixed in his notice.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

HAMER, J., not sitting.

RICHARD S. KEAT, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18229.

Carriers: SHIPMENT OF LIVE STOCK: DUTY OF CARRIER. A common carrier is not bound to comply with every arbitrary request made by a shipper of live stock as to the place where such stock shall be unloaded and fed while in transit. It is only obliged to comply with such requests and instructions regarding the care of the shipment as may be reasonable. Whether a particular request or instruction of the shipper is reasonable or unreasonable is a question for the jury.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

A. A. McLaughlin, Edgar R. Hart and *Wymer Dressler*, for appellant.

Earl R. Ferguson and *Harry W. Shackelford, contra.*

BARNES, J.

This action was commenced in the justice court of Douglas county to recover damages alleged to have been sustained by plaintiff in the shipment of two car-loads of cat-

tle from Bassett, Nebraska, to the stock-yards at South Omaha, in said state. The plaintiff had judgment, and the defendant appealed to the district court.

The plaintiff, by his petition, alleged, in substance, that on the 15th day of July, 1911, he delivered two car-loads of cattle in good condition to the defendant company at Bassett, Nebraska, for shipment to South Omaha; that he instructed the defendant to unload and feed said cattle at its stock-yards in Fremont, and reload and trans-ship them to South Omaha on the evening of July 16, in order to have them on the market at that point on the morning of July 17; that defendant negligently failed to comply with plaintiff's instructions, and carried the cattle through to South Omaha without unloading and feeding at Fremont; that the cattle arrived at South Omaha on the morning of the 16th of July at about 8:30 o'clock, and were unloaded and put into the stock-yards at that point, where they were fed, watered and rested; and that when they were put on the market on the morning of the 17th of July they had shrunken in weight and were not in good marketable condition, and that he was thereby caused a loss and damage of $159.65, for which sum he prayed judgment. Defendant, by its answer, admitted the receipt of the cattle for shipment, and that it carried them to South Omaha, and denied all of the other allegations contained in the petition. The reply was a general denial.

It appears from the evidence that the distance from Bassett to Fremont was 205 miles; that the usual time required to make that distance was from 14 to 15 hours; that the distance from Fremont to South Omaha was 41 miles, and the running time between those points was about three hours. It appears that there was no delay in the shipment, and the only question to be determined is whether the defendant company was negligent in not unloading and feeding the stock at Fremont. It was also shown that the time consumed in the shipment was only about 21 hours, and that when the cattle reached South Omaha, where they were unloaded and fed, they rested from Sunday morning at 8:30 o'clock until they were put on the market on the

following Monday morning. On the trial in the district court the plaintiff had the judgment, and the defendant has appealed.

At the conclusion of the evidence the district court instructed the jury as follows:

Instruction No. 3. "Before the plaintiff can recover in this action, it is incumbent upon him to prove to you by preponderance of the testimony that, at the time he delivered said cattle to the said defendant railroad company, he instructed the defendant, through its agent at Bassett, Nebraska, to cause the said cattle to be unloaded at Fremont, Nebraska, and there fed and watered and permitted to rest, and, after such feeding, watering, and resting, to transport the cattle to South Omaha for the market of Monday morning, July 17, 1911; and that, by reason of such failure, he suffered damages, and the amount of the same. Now, if he has proved these facts by a preponderance of the evidence, then you should find for the plaintiff, assessing such damages as under the testimony he is shown to have sustained."

Instruction No. 4. "If you find from a preponderance of the testimony in this case that, at the time the plaintiff delivered the cattle to the defendant at Bassett, Nebraska, he instructed the said defendant, through its agent at Bassett, Nebraska, to unload, feed, and water said cattle, and allow them to rest at Fremont, Nebraska, and you further find that there were facilities for doing the same at Fremont, Nebraska, then it became the duty of the defendant to unload said cattle at Fremont, Nebraska, feed and water the same, provided they had such facilities, and allow the said cattle to rest, and after so doing to transport them to the market at South Omaha, Nebraska; and, if they failed so to do under such circumstances, then such failure so to do would be negligence on the part of the railroad company, and, if the plaintiff suffered damage by reason of such negligence, then the defendant would be liable for such damages as the plaintiff suffered by reason of such negligence."

The appellant contends that the foregoing instructions were erroneous and require a reversal of the judgment in this case. This contention seems to be well founded. Where cattle are shipped by railroad a distance requiring only 21 hours for the transportation, and no circumstances are present making it necessary for the care of the animals that they be unloaded short of destination for feed, water, and rest, it is not negligence, as a matter of law, to fail to comply with a request of the shipper made to the railway agent at point of shipment that the cattle be unloaded at an intermediate point for feed, water, and rest. A common carrier is not bound to comply with every arbitrary request made by a shipper, but is only obliged to comply with such requests and instructions, regarding the care of the shipment, as may be reasonable; and whether a particular request or instruction of the shipper is reasonable or unreasonable is, at most, a question for the jury. *Missouri, K. & T. R. Co. v. Clark,* 35 Tex. Civ. App. 189; *St. Louis S. W. R. Co. v. Mitchell,* 101 Ark. 289; *Regan v. Adams Express Co.,* 49 La. Ann. 1579; *Galveston, H. & S. A. R. Co. v. Jones,* 123 S. W. (Tex. Civ. App.) 737.

The court instructed the jury that it was negligence, as a matter of law, for the defendant company to disregard the plaintiff's request to unload, feed, and water his cattle at Fremont, Nebraska. That question should have been submitted to the jury, and should not have been declared negligence as a matter of law.

The defendant requested the court to instruct the jury as follows: "The defendant in this case is a common carrier of live stock, and it was its duty to comply with the desires of the plaintiff concerning the handling of his shipment, if such request was reasonable; but if you find from the evidence that the only reason the plaintiff had for desiring to have his cattle unloaded at Fremont was a mere notion or caprice on his part, and if you further find that such is not a usual and customary way of handling live stock shipments between Bassett and South Omaha, the defendant was not guilty of negligence, as a matter of law, by reason of its failure to comply with the shipper's re-

quest to unload the animals at Fremont" It was shown that when the cattle arrived at South Omaha on Sunday morning, July 16 at 8:30 A. M., they were fed, watered, and rested from noon of that day until the following morning, or nearly 24 hours before they were placed on the market.

Counsel for the appellee seems to rely on *Modesitt v. St. Joseph & G. I. R. Co.*, 90 Neb. 133, to sustain the judgment. The facts of that case are not the same as those in the case at bar.

As we view the evidence and record, the defendant did not have a fair trial, and the judgment of the district court is therefore reversed and the cause is remanded for further proceedings.

REVERSED.

HAMER, J., not sitting.

WALTER L. MERCER, APPELLEE, V. WARD W. ARMSTRONG, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18237.

1. **Execution, Proceedings in Aid of.** The provisions of sections 8117, 8118, Rev. St. 1913, apply to proceedings in garnishment after judgment and return of an execution *nulla bona*. The provisions of sections 8100 and 8101 do not apply to such a proceeding.
2. **Appeal: FINDINGS OF FACT: REVIEW.** In order to obtain a review of the findings of fact, the evidence must be preserved in a bill of exceptions.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

Williams & Williams, for appellant.

G. J. Hunt, contra.

BARNES, J.

This was a proceeding in garnishment after judgment. The trial court found that the judgment debtor was not

entitled to an exemption of all of the money in the hands of the garnishee, and ordered that so much thereof as was necessary to satisfy the judgment should be paid into court for that purpose. The judgment defendant has appealed.

The record which the appellant has brought to this court discloses that on the 9th day of November, 1912, judgment was rendered in the district court for Morrill county against Ward W. Armstrong and in favor of Walter L. Mercer for the sum of $273.35; that on the 16th day of November, 1912, an execution was issued to the sheriff of Morrill county; the appellant at that time having removed to and become a resident of Buffalo county, Nebraska. On the 16th day of November, 1912, the sheriff returned the execution unsatisfied for want of goods and chattels in his county whereon to levy. Thereafter, and on the same day, an affidavit in garnishment was filed in the office of the clerk of the district court for Morrill county against Mark Spanogle and the Bridgeport Bank, Spanogle being cashier of said bank. Notice to the garnishee was served upon Spanogle and the bank. On the 26th day of December, 1912, Spanogle answered that he held $500, the property of the judgment debtor, in his possession. On the 27th day of December, 1912, the clerk of the district court for Morrill county issued a notice of said garnishment proceeding to the judgment defendant and directed it to the sheriff of Buffalo county for service. The notice required the judgment debtor to appear and show cause why so much of the funds in the hands of the garnishee as might be necessary should not be ordered paid into court to satisfy the judgment and costs. The notice was returnable January 16, 1913, and was served on the appellant on the 3d day of January of that year. Afterwards, on the 11th day of January, the appellant filed his affidavit in the district court for Morrill county setting forth that he was a resident of Buffalo county, Nebraska, and was the head of a family; that he had neither lands, town lots, nor houses subject to exemption as a homestead under the laws of this state, and followed the same by an inventory of his property and a statement of the alleged incumbrances thereon.

On the 10th day of March, 1913, the case came on for hearing. Appellant objected to the jurisdiction of the court because no appraisement had been made of the property scheduled in his inventory. The court overruled the objection, witnesses were sworn and testified as to the property owned by the appellant and the value thereof, over appellant's objection. Thereafter, on the 31st day of March, the court made an order finding "that defendant is not entitled to hold as exempt all of the funds in the hands of the garnishee," and ordered the garnishee to pay out of the money in his hands to the clerk of the court an amount sufficient to pay the judgment and costs, to all of which findings and order of the court the appellant excepted, and to reverse that order has prosecuted this appeal.

Appellant claims that, under the provisions of section 8100, Rev. St. 1913, when he filed his affidavit and inventory it was the duty of the officer holding the writ under which the levy had been made, to call appraisers and appraise the property scheduled, and thereby ascertain what, if any, part thereof was exempt, and in this case no such appraisement was made. Appellant contends that the court had no jurisdiction to take testimony of the value of claimant's interest in the property scheduled; that his findings and judgment based on such testimony are absolutely void; and cites sections 8100, 8101, Rev. St. 1913, in support of his claim.

We think the appellant's contention is not well founded. The record shows that the execution which had been issued to the sheriff of Morrill county had been returned unsatisfied. The sheriff's connection with that execution was therefore terminated. Later on the sheriff was called upon to serve process in the same proceeding, and the record discloses that the summons in garnishment was served upon Spanogle and the Bridgeport Bank; that summons was returned and the officer's duty was ended. Therefore it was evident that the sheriff of Morrill county could not be expected to appraise the property situated in Buffalo county. He would have no right or authority to go to that

county in the execution of any writ issued from the district court for Morrill county, and, as the officer to whom the writ was directed and by whom it was returned neither found nor levied upon any property in Morrill county, there was nothing for him to appraise. No writ was ever issued to the sheriff of Buffalo county, and, as the property described in appellant's affidavit was never levied upon by any one, there was nothing to appraise in that county. It follows that the statute relied upon by the appellant is inapplicable to the proceedings involved in this appeal.

Section 8117, Rev. St. 1913, provides, in substance, that after the issuance and return of an execution against the property of the judgment debtor, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person has property of the judgment debtor or is indebted to him, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action in such manner as may seem to him proper. Section 8118 provides, in substance, that witnesses may be required, upon the order of the judge, or by subpœna issued by the clerk of the district court, to appear and testify upon any proceeding under the chapter in which these sections are found, in the same manner as upon the trial of an issue. See, also, sections 8119–8128, Rev. St. 1913.

The record here discloses that the order was served upon the appellant as prescribed by the court. A time was designated in the notice for the defendant to appear, and the orders subsequently entered show that the parties appeared and testified. The appellant, however, relied upon the provisions of sections 8099, 8100, 8101, Rev. St. 1913, and failed to bring a bill of exceptions to this court setting forth the testimony taken upon the hearing before the district court for Morrill county. It seems clear that the court had jurisdiction of the parties and the subject matter in controversy, and, his judgment being founded

upon a question of fact to be determined by the evidence, it follows that, without a bill of exceptions, it must be presumed that the judgment of the district court was supported by the evidence.

The judgment is therefore

AFFIRMED.

HAMER, J., not sitting.

KATE N. HOHENSHELL, APPELLANT, V. ARCHIBALD HOHENSHELL, APPELLEE.

FILED SEPTEMBER 20, 1915. No. 18153.

Homestead: CONVEYANCE: COMPETENCY OF WIFE. Under the evidence set forth in the opinion, *held*, that at the time of the execution and acknowledgment of the deed of conveyance of the family homestead to the defendant the wife was incompetent, and the conveyance was, therefore, void.

APPEAL from the district court for Cass county: GEORGE F. CORCORAN, JUDGE. *Reversed with directions.*

Matthew Gering and *C. S. Polk,* for appellant.

Rawles & Robertson, contra.

LETTON, J.

This is an action to set aside a conveyance of real estate executed by Joseph Hohenshell and his wife in their lifetime to their son, Archibald Hohenshell. The plaintiff alleges that she is one of two surviving children, sole heirs of her deceased father and mother; and that in April, 1904, when her parents were incompetent, the defendant, by fraudulently representing that he was procuring a lease for a tenant for a part of the land, or a release of a mortgage held by them, procured his parents to go through the form of signing a deed which purported to convey to him the 320 acres of land in controversy, subject to the homestead right of the grantors; that the deed was never

acknowledged nor delivered; that the parents continued to live on the land until their respective deaths; that the defendant never sought to dispossess them or claim ownership of the land as long as they lived; and that she is the owner of an undivided one-half interest in the real estate.

The answer admits the execution of the deed; denies fraud; alleges that as soon as the deed was made defendant took possession, and has ever since held it in his own name with the knowledge and acquiescence of his parents; that he has placed valuable improvements on the land, amounting to the value of $3,250; that the consideration for the deed was the maintenance and care of his parents, both in sickness and health, and the payment of the expenses of the last sickness and funeral expenses; that the deed has been executed more than eight years, and recorded more than seven years in the county where the plaintiff resides; and that she is barred by lapse of time. The other material allegations of the petition are denied. The district court found for the defendant, and plaintiff appeals.

The facts developed by the testimony are somewhat peculiar. In the first place, there is a direct issue raised as to whether the plaintiff is the daughter of Joseph Hohenshell and Jamima Hohenshell. A consideration of the testimony on this point leads us to the conclusion that the plaintiff was born sometime before the marriage of Jamima Hohenshell and Joseph Hohenshell, and that she is the daughter of Jamima. After the marriage she became a member of the family, and was known by the name of Kate N. Hohenshell. The family lived at first in Pennsylvania, and afterwards moved to Ohio. She eloped and was married in 1868, in Iowa, to David Hohenshell, a cousin. In 1869, and after her marriage, the other members of the family moved to Nebraska. Plaintiff and her husband moved to this state in 1879. The testimony seems to establish that kindly relations existed for many years between Mr. and Mrs. Hohenshell, seniors, and the plaintiff, they speaking of her and recognizing her as their daughter. Plaintiff testifies to the entry of her name in a

family Bible; but the Bible itself was not produced, and she does not know where it is.

As to the execution of the deed, it appears that Joseph Hohenshell had suffered from an injury to his leg, and to relieve the pain morphine had been administered by a physician. He became slightly addicted to the use of the drug. At the time the deed was executed Joseph Hohenshell was about 73 years of age and his wife was aged about 75 years. Some time previous to this Mrs. Hohenshell had become strongly addicted to the use of morphine, first taking it through the stomach and afterwards by hypodermic injections. The circumstances attending the execution of the deed are about as follows: Some time before the deed was executed Joseph Hohenshell had employed a lawyer to act for him in a case involving the boundary lines of his land. On the last day of the trial of this case he told his attorney that he wanted to convey his real estate and personal property to his son, Archibald; that Archibald had always remained at home and taken care of him and his wife without compensation. He also said that Mrs. Hohenshell had a daughter by a prior marriage that was not his child. The attorney testified that he afterwards received instructions to prepare the papers, which he did and mailed them to Mr. Hohenshell, and that they were afterwards returned to his office properly executed. It is his impression that he gave them to Archibald afterwards. He testifies that, in his opinion, Mr. Hohenshell was mentally sound and competent to convey at the time of this transaction. It is shown that at the time the deed was executed a notary public had been called to the house to take the acknowledgment of the parties to the release of a mortgage, and that, just before he left, Archibald said there were some other papers that ought to be executed. He then procured the papers from a desk, and took them to another room, where they were signed by his father and mother and there acknowledged. There is no proof that the signatures were obtained by means of a fraudulent substitution of papers, as alleged.

There is a large mass of testimony with respect to the use of morphine and the resultant effects upon the mental condition of Jamima Hohenshell, both before and after the time of the execution and acknowledgement of this deed. She would waver and vacillate in her actions, and was often inconsistent in her statements. At one time she declared that they had given the property to Archibald in return for what he had done for them, and that she was satisfied with his conduct otherwise; at other times she found serious fault with the manner in which he treated her, claiming that, against her wishes, he brought into the household and retained there a woman of ill repute, who suffered several miscarriages while there. At one time she signed a petition to set aside this deed, alleging that her husband had had a paralytic stroke, and was *non compos mentis* at the time the deed was made; that she was unable to read or write; and was also incompetent at that time on account of her excessive use of morphine and other opiates. Some time after this petition was signed, Mrs. Hohenshell seemed to become concerned as to its execution, and said she did not understand what she had signed, and that she desired to revoke it and confirm the deed to Archibald.

Taking the whole testimony with respect to the mental condition and competency of Mrs. Jamima Hohenshell, and considering that of the medical experts, we are driven to the conclusion that, at the time she signed and acknowledged the conveyance in question, her age and the habitual use of the drug had so affected her mental faculties that she was incompetent to fully know or understand the nature and consequences of the act which she then performed. It is true that the notary, who was there merely for a few moments, and the other witnesses present testify that they saw nothing unusual in her conduct at the time; but this we think is not enough, when considered in connection with all the other evidence. We are satisfied that a conveyance of a homestead executed by a wife under such circumstances ought not to stand. The deed and acknowledgment being invalid as to the wife, by reason of

the homestead character of the land and the statutory requirements for the conveyance of a homestead, it was absolutely void as to the husband also.

Joseph Hohenshell died in 1910. By virtue of section 1, ch. 23, Comp. St. 1909, then in force, the land descended, subject to debts and the widow's homestead right, "one-half to the husband or wife if the survivor is the parent of all the children of the deceased and there be only one child, or the issue of a deceased child, surviving." By force of this provision, since there was only one surviving child of the deceased at her husband's death, Jamima became the owner in fee of one-half of the real estate. Upon her subsequent decease, Archibald and Kate, the plaintiff, being her only children and heirs, inherited equal shares of her land. Archibald, therefore, by descent from both parties, is the owner of an undivided three-quarters interest in the real estate. Plaintiff, by inheritance from her mother, is the owner of an undivided one-fourth interest.

The judgment of the district court is reversed and the cause remanded, with directions to set aside the conveyance, to enter a decree in accordance with this opinion, and to take such other proceedings as may be required under the issues.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CATHERINE SIMONSEN, GUARDIAN, APPELLEE, V. JAMES HENRY HOUSE, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18233.

Contracts: CANCELATION: INSANITY. A merchant, who had shown some symptoms of insanity previous to the transaction, exchanged his stock of goods and certain real estate for a tract of land incumbered by mortgage, the value of which was grossly disproportionate to the value of the property with which he parted. A few months afterwards the disease progressed to such an extent that

he was adjudged insane and committed to an insane hospital. *Held*, upon a trial *de novo*, that the decree of of the district court setting aside the conveyances is justified by the law and the evidence.

APPEAL from the district court for Washington county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

E. B. Carrigan and *Frank Dolezal*, for appellant.

Sullivan & Rait, Arthur C. Thomsen and *S. A. Searle, contra.*

LETTON, J.

In September, 1911, Henry Simonsen owned a stock of general merchandise, and resided in the village of Washington, Nebraska. He also owned his residence, the store building, a livery barn, an ice house, and other structures in the village. Early in October of that year he exchanged his stock of goods and all his real estate for 350 acres of land in Fremont county, Iowa, belonging to the defendant and appellant, James Henry House. After the exchange Simsonsen remained with his family in Washington, and assisted in the store to some extent, until early in November, when he removed to Omaha. In February, 1912, Simonsen was sent to the Omaha General Hospital for treatment on account of mental trouble. About a month afterwards he was adjudged to be insane and committed to the state asylum for the insane at Lincoln, where he has since remained. The nature of his affliction is involutional melancholia, and it seems to be conceded that it is incurable. His wife was afterwards appointed guardian of his estate. In July, 1912, she began two actions, one a suit in replevin to recover the possession of the personal property, and the other an action in equity to set aside the conveyance of the real estate, upon the ground that Simonsen was of unsound mind at the time of the transaction, was incapable of knowing or judging the value of the property, and incompetent to enter into any contract. It is alleged that the property exchanged by him was of the reasonable value of $16,000, and that the property received,

after deducting the liens and incumbrances, was not worth more than $1,000. The replevin case and the action in equity were consolidated and tried to the district court without a jury. Possession of the personal property was not taken under the writ of replevin. A mass of testimony was taken as to the mental condition of Simonsen at and before the time of the transaction, and the value of the respective pieces of property. The court found that Simonsen was insane at the time of the exchange, and that the value of the personal property was $9,000. Judgment was entered for the value of the goods, and a decree requiring a reconveyance by House of the real estate, and that, upon such reconveyance being made and the payment of the judgment, the title to the land in Iowa be reconveyed to House. A motion for a new trial was filed and overruled, and defendant has appealed.

The questions involved are questions of fact; the principal one being as to Simonsen's sanity at the time of the transaction. This question is not free from doubt. According to the testimony of some of the members of his family, and a few other witnesses, for some time before the exchange he had been suffering from severe headaches; he frequently carried on conversations with himself in the store in an excited manner; contrary to his former course of conduct, he became irascible and was easily irritated; he would not allow his family to converse at the table; his gait became shambling, though he had formerly walked with a quick, firm step; and a number of other peculiarities were detailed, different from his former manner and demeanor. The testimony of the witnesses for the defendant was to the effect that, although they were intimate with and had seen Simonsen nearly every day until after he sold the store, they had observed nothing unusual in his manner or in his actions. It was also shown that while he was living in Omaha he had examined and recommended the purchase of a tract of land for his wife, apparently using sound judgment. The medical witnesses agreed that Simonsen at the time of his commitment to the asylum was suffering from involutional melancholia, but disagreed as

to whether the facts in evidence showed that he was so insane at the time of the transaction with House as to be incompetent. It was practically conceded that during the progress of the disease his mind might be clearer and his judgment better at one time than at another, but they left in doubt the time when his disease affected his judgment. The theory of defendant was that the disease had its inception after Simonsen moved to Omaha, and the evidence in his behalf tended to establish that a complete change of locality and occupation, or the lack of occupation, by a man who had previously led an active life, might, at Simonsen's age, bring on the type of insanity with which he was afflicted. On the other hand, the testimony in behalf of plaintiff tended to show that the symptoms described which existed prior to the exchange indicated an impairment of the mind at that time, which might, at times, seriously affect the judgment.

Before the exchange was made Simonsen went to Iowa with House, and was taken over the land by a former owner who was acting for House. He seemed to be impressed with its value on account of its orchards, and as a hog farm on account of the nut-bearing trees growing on it, and concluded negotiations on his return home. It seems clear from the evidence that this land is comparatively of little value; that a large portion of it consists of steep hills and deep hollows and ravines, mostly covered with scrub timber; that only a very small portion is tillable; that there are now only about 34 acres under cultivation in 9 scattered fields; and that a small number of apple trees are standing on it. There is a conflict in the evidence as to the actual value of the property, the witnesses for plaintiff putting the value at from $15 to $20 an acre, while the defendant's witnesses estimate the value to be from $40 to $50 an acre. We are satisfied from the evidence that $20 an acre, or a little more, was the fair value of the land, and that the incumbrances nearly equaled its value, leaving the net value of the property he received in exchange little or nothing. Simonsen had been a successful business man, was careful and economical, and had acquired his

property by the exercise of industry and good judgment. The very fact that he exchanged property of the nature of that which he possessed at Washington for a tract of land such as that of defendant, even after giving due weight to the facts that he was over 60 years of age, his family was scattering, and he wished to retire from business, seems to indicate an impairment of judgment which in all probability resulted from mental disease. There is testimony that some time after Simonsen made the exchange and after he had revisited the Iowa land, he expressed the opinion that no man in his right mind would have entered into the transaction. He evidently had a lucid interval when he made this statement.

The findings and decree are in accordance with the evidence, and the judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

OWEN C. CARROLL, APPELLEE, V. GOTTLIEB POLFUS, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18239.

1. **Appeal: SUPERSEDEAS BOND: EFFECT.** The decree in this an action for specific performance required the plaintiff to reduce the amount of certain incumbrances upon his property within 20 days, whereupon specific performance was ordered. A supersedeas bond and notice of appeal were filed by the defendant within that time. After the expiration of 20 days defendant moved for a judgment of dismissal on account of plaintiff's failure to comply with the order reducing the incumbrances. *Held*, that, upon the supersedeas bond being filed and approved, the power of the district court to proceed was suspended, and the court properly overruled the motion.

2. **Contracts: SUIT TO SET ASIDE: INTOXICATION.** A contract will not be set aside on the ground that one of the parties was intoxicated at the time it was entered into, if at the time he fully understood the surrounding circumstances and knew the character and consequences of his act.

APPEAL from the district court for Harlan county: ERNEST B. PERRY, JUDGE. *Affirmed.*

John Everson and *J. G. Thompson,* for appellant.

O. E. Shelburn, contra.

LETTON, J.

Action for specific performance of a contract for the exchange of real estate. The defense is that at the time the contract was entered into the defendant was in such a state of intoxication that he was incapacitated from entering into a contract or exercising judgment, and that the value of the property taken in exchange for that of defendant was and is grossly inadequate in value. At the request of defendant a jury was impaneled to make special findings of fact, which are as follows:

"If you find that the defendant did sign the contract, at the time it was signed was he so intoxicated that he was deprived of his reason and understanding to such an extent as to render him incapable of comprehending the character and consequences of his act? A. No.

"What was the fair market cash value of the property which the plaintiff, Owen C. Carroll, was to exchange for the property of defendant, at the date of the contract? A. Seventeen hundred dollars ($1,700).

"What was the cash market value of the property which the defendant Polfus then owned, and which the plaintiff claims he was to have for his property? A. Two thousand dollars ($2,000)."

The court also made like special findings. A decree was entered "that the plaintiff have a specific performance of his contract, upon reducing the incumbrance of his real estate (describing it) to $600 and no more, and upon reducing the incumbrance upon his meat market fixtures to $400 and no more; all of which is to be done within 20 days from this date." It is further adjudged that the defendant execute a deed to the property owned by him within 20 days, or that the decree operate as a conveyance. A motion for a new trial was filed and overruled. A su-

persedeas bond was filed and approved on March 7, 1913. The transcript and præcipe were filed in this court on August 26, 1913. On May 9, 1913, at the same term of court, a motion to dismiss the suit was filed by the defendant, for the reason that the plaintiff had not complied with the order reducing the incumbrance within 20 days from the date of the decree. The term adjourned on May 10 with this motion pending. On May 12 the defendant filed a motion for judgment upon the pleadings and the decree. Plaintiff made a special appearance to these motions, objecting to the jurisdiction of the court, for the reason that the defendant had superseded the judgment. The special appearance was overruled, and the motions of defendant for judgment and to dismiss the action were also overruled.

The first point urged is that the order that the plaintiff have specific performance when he reduced the incumbrance upon the property was a final order, and that, since the incumbrance upon the property had not been reduced as directed, the decree should have been set aside and judgment rendered for the defendant upon the pleadings. This motion was properly overruled. The decree had previously been superseded. In *State Bank v. Green,* 8 Neb. 297, 305, it is said: "Upon the bond being filed and approved, the power of the court below to proceed in the case is suspended until the bond is set aside, modified, or the appellant fails to perfect his appeal within the time required by the statute." *Kountze v. Erck,* 45 Neb. 288; *Jenkins Land & Live Stock Co. v. Attwood,* 80 Neb. 806. There was no necessity that the incumbrance should be reduced until it was known that the litigation was ended and the contract was to be carried out. It will be the duty of plaintiff, within 20 days from the time of the filing of the mandate in the district court, to comply with the order, and if he fails so to do proper action can be taken in that court at the instance of defendant.

An examination of the evidence has convinced us that the findings of the court and jury with respect to the competency and ability of defendant to enter into a contract

at the time it was made were fully sustained thereby. The defendant had been habitually addicted to the use of intoxicants for a long time prior to the date of the transaction, but it is clear that he was capable of transacting business even when his breath was loaded with the fumes of alcohol. The explanation given by him to a number of apparently credible witnesses next day, that the reason he refused to complete the trade was because his son, whom he had expected to take charge of the meat market, had refused to do so, and he could not afford to hire two men to run it, seems to give the real reason for his failure to complete the contract.

It is next contended that there is such a disparity between the values of the property that it would be inequitable to enforce the contract. The evidence shows Polfus is quite experienced in the transfer and exchange of property. He voluntarily entered into the bargain after having considered it for some time, taken the advice of others, and made a personal examination of the property. No fraud was practiced. The difference in value is not so great but that he might have believed that he was getting the better of the transaction at the time he made the exchange. We think there is no room for the application of the rule that specific performance will not be enforced where fraud has been perpetrated, or where it will be unjust and inequitable to compel the performance of the contract.

The judgment of the district court is therefore

AFFIRMED.

HAMER, J., not sitting.

CHARLES A. CURRIER, APPELLEE, V. SETTY SCHMIDEKE TESKE ET AL., APPELLANTS.

FILED SEPTEMBER 20, 1915. No. 18931.

1. **Husband and Wife: DEED TO WIFE.** A warranty deed made prior to 1877 by a husband direct to his wife conveyed to her all his estate in the premises, both legal and equitable.

2. **Mortgage Foreclosure: DECREE: PARTIES.** In an action brought after her death to foreclose a mortgage given by the wife in her lifetime, the rights of her son and sole heir were not affected by the proceedings, since he was not made a party to the action.

3. **Appeal: ASSIGNMENTS OF ERROR.** Where the assignments of error in this court are that the judgment is contrary to law, and that the court erred in overruling motions for a new trial, and no specific error in these connections is pointed out in the brief, the assignments are too general and indefinite.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

J. F. Boyd and *M. D. Tyler,* for appellants.

Willis E. Reed and *William V. Allen, contra.*

LETTON, J.

This is an action in ejectment, and to recover rents and profits. The facts are set forth at length in the opinion, *Currier v. Teske,* 93 Neb. 7. The district court had found that the plaintiff was only entitled to an undivided one-half interest in the property on account of a deed having been made to Allen and Reed of the other undivided half. But it was said in the opinion by Hamer, J.: "We think that, since the testimony was undisputed that the conveyance to Allen and Reed was intended as a mortgage and was a mere lien or security on the land for the payment of fees and expenses, the district court erred in submitting that question to the jury. The verdict was wrong in giving only an undivided one-half interest in the premises to the plaintiff. The plaintiff seems to be entitled to recover possession of the whole of the premises according to the prayer of the petition. The judgment of the district court is reversed and the cause is remanded for further proceedings in accordance with this opinion." After the cause was remanded, a trial was had to a jury and a verdict rendered for the plaintiff for the possession of the premises and damages. Motions for a new trial were filed by the defendants, which were sustained and a new trial awarded. Afterwards, by stipulation, a jury was waived and the

case tried to the court. Judgment of ouster and for rents and profits after the termination of the life estate was entered in favor of plaintiff. The cause is now here upon appeal from this judgment.

Five errors are assigned and relied upon for reversal. The first is that the judgment violates section 10, art. I of the Constitution of the United States, and section 3, art. I of the Constitution of the state of Nebraska, for the reason that it impairs the obligation of a contract, and deprives the appellants of vested rights without due process of law. The argument is that the married woman's act of this state was considered by this court in 1877, in the case of *Aultman, Taylor & Co. v. Obermeyer,* 6 Neb. 260, and it was held: "By the common law neither husband nor wife could convey lands to each other. And our law still regards them, in relation to each other, as one person, notwithstanding the statutes enlarging the rights of the wife"—that, at the time the foreclosure proceedings were had under which the defendants acquired title, this decision was the law of the state; that, since the deed from Currier to his wife was void, her son and heir, Charles A. Currier, took no interest in the premises; that it was unnecessary to make him a party to the foreclosure suit, and therefore that the foreclosure sale transferred the entire title. This argument overlooks several important and material matters. The case of *Aultman, Taylor & Co. v. Obermeyer, supra,* was a creditor's bill. The proof showed that no consideration passed from the wife to the husband for the deed, and that it was made in fraud of creditors. In addition to the quoted portion, the opinion says: "Where it is apparent that such a deed has been made, in pursuance of a valid antenuptial agreement or upon a sufficient consideration, it might be sustained in equity." In *Berkley v. Lamb,* 8 Neb. 392, which was decided in 1879, it was said: "At law such a deed is void, but equity will sustain it when made upon a sufficient consideration, or in pursuance of a valid antenuptial agreement." The foreclosure proceedings were had about two years after this opinion was filed. The deed recites a valid con-

sideration passing between the grantee and grantor, so that, even if defendants' argument is conceded to be sound, the deed had been held by this court, before the foreclosure suit, to be good in equity. The recorded deed was notice of Mrs. Currier's interest in the land. Equitable estates in land are devisable and descendible. *Cutler v. Meeker,* 71 Neb. 732. Even if Currier retained the naked legal title, the equitable title of Mrs. Currier passed to her son at her death. He was a necessary party to the foreclosure suit if it was desired to bar him of his rights.

We think the argument of defendant is based upon a false premise and is unsound. In neither of the cases decided before 1881 was the statement, that a deed made directly from husband to wife is void, essential to the decision, nor did the issues require such a determination. But in *Furrow v. Athey,* 21 Neb. 671, the issue was direct, the deed being attacked because made directly to a wife. The syllabus states: "A deed of conveyance of real estate, executed by the husband directly to the wife, in the absence of fraud, and when neither the rights of creditors nor subsequent purchasers intervene, will convey to her such real estate without the intervention of a third party as trustee." This is the first case in which the point was expressly determined as essential to a decision. The subsequent cases in this court are set out in the opinion in *Currier v. Teske,* 84 Neb. 60, a full and interesting annotation to which case may be found in 133 Am. St. Rep. 607. At the time of the foreclosure the question was an open one, but *Furrow v. Athey, supra,* settled the validity of such a deed. No decision creating any rule of property which excluded the right of Mrs. Currier to take or her heir to inherit from her had been made prior to the foreclosure proceedings, and no vested right to the property of her son and heir could be acquired at a judicial sale, when he had not been made a party to the action.

We have no fault to find with the cases cited by defendant, but they are not applicable to the facts in this case. Moreover, the prohibition in the federal Constitution of the impairment of the obligation of a contract applies to the

enactment of statutes, and not to a change of the decision of a court, even if one had been made. *Hanford v. Davies*, 163 U. S. 273, 280; *National Mutual Building & Loan Ass'n v. Brahan*, 193 U. S. 635, 651.

The second assignment is: "The judgment is contrary to law." This assignment is too general for consideration; but, since in the appellant's brief it is treated of in connection with the question raised by the first assignment, what has been said with reference to the first assignment applies equally to both.

The third assignment is: "The evidence is insufficient to sustain the finding and judgment of the court." There is some evidence for plaintiff in addition to that taken in the former trials. It has been twice decided that the former evidence was sufficient. This is now the law of the case. With the additional evidence produced, it is ample to sustain the judgment.

Assignments 4 and 5 are that the court erred in overruling the separate motions of the respective defendants for a new trial. These assignments are too general. In fact, no argument is made to support them, and, under the well-settled rules of this court, they cannot be considered. *Waxham v. Fink*, 86 Neb. 180.

We find no error in the judgment of the district court, which was evidently rendered in accordance with our previous decisions and the settled law of the case.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

BURKE E. BODWELL, APPELLANT, V. JOHN R. WEBSTER ET AL., APPELLEES.

FILED SEPTEMBER 20, 1915. No. 18203.

1. **Master and Servant: "INDEPENDENT CONTRACTOR."** An "independent contractor" is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of the work.

2. ———: RELATION. While the existence or the absence of the right of the employer to control the work is a usual test to determine whether the workman is a servant or an independent contractor, the right of the employer to discharge him, the absence of an independent occupation, and the mode of compensating him and his subordinates, may be factors indicating the true relation.

3. ———: INJURY TO EMPLOYEE: LIABILITY. The mere fact of the nominal employment of a workman as an independent contractor will not relieve the master of liability for his torts, where he is in fact employed as a servant.

4. ———: "INDEPENDENT CONTRACTOR:" QUESTION FOR JURY. Where the relation between the owner of a building and a workman engaged to repair it is not evidenced wholly by a written instrument, but is affected by extrinsic facts and circumstances, from which different deductions may reasonably be drawn, whether the workman was an independent contractor is a question for the jury.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Reversed.*

Raymond M. Crossman and *W. C. Fraser,* for appellant.

Greene, Breckenridge, Gurley & Woodrough, contra.

ROSE, J.

Plaintiff brought this action to recover $3,000 for personal injuries alleged to have been sustained by him while assisting in the repair of an elevator in the Webster-Sunderland building in Omaha. Defendants Webster and Sunderland are the owners. It was alleged in the petition that defendant Samuel K. Hanford was superintendent and foreman in and about the building and as such had charge of repairs; that plaintiff was employed to assist in replacing a tiller cable in the elevator, it being necessary for him to go down into the elevator pit to loosen one end of the cable; that the injury to plaintiff was caused by the negligence of Hanford in failing to warn him of the dangers incident to the work; that plaintiff was an inexperienced workman and not aware of the dangers; that Hanford negligently pulled the tiller cable while plaintiff was in the elevator pit and caused the elevator to descend upon him, causing injuries to his ankle, leg and back. In

their answer defendants Webster and Sunderland alleged that Hanford was an independent contractor, for whose torts they were not responsible. At the close of plaintiff's testimony, they moved for a directed verdict in their favor, urging, among other grounds, that the defense mentioned was conclusively established. The motion was sustained. The trial proceeded against Hanford alone, and the jury rendered a verdict against him for $700. From the order dismissing the action as to Webster and Sunderland, plaintiff has appealed.

Was Hanford an independent contractor? The letter appointing him to his position says: "You are hereby appointed superintendent of the office portion of the Webster-Sunderland building. We desire you to take charge of the employees, viz., the fireman, operator of the elevator, and janitor; also, desire you to take charge of any repairs or improvements required in the office portion of the building.

"Regarding repairs and improvements: Any small expenditures that will only require a few dollars we will leave to your judgment, but anything calling for an expenditure of say $10 or more, we would like to have you refer to us before incurring the expense.

"It is our desire that the office part of the building shall be kept up in good shape, that the halls shall be kept neat and clean, that no disorder shall be permitted, that the employees shall attend faithfully to their duties, and in general that the building shall be kept in as attractive condition as possible and entirely satisfactory to the tenants. * * *

"Regarding your compensation: I told you that we were paying 5 per cent. on the cost of all this matter. I find that I am in error, that George & Co. have not been charging us 5 per cent. on the salaries of the employees or for sundry items for janitors' supplies. They just charged us 5 per cent. on the repairs. I, therefore, suggest, as a fair compensation to you, that we pay you as follows: For the work you have been heretofore doing, looking after the elevator, electric lights, etc., $10 per month. Supervision

of employees and repairs and improvements, 5 per cent. commission."

Hanford testified that he was an electrical contractor, having his office in the Webster-Sunderland building. After the receipt of the foregoing letter, November 4, 1910, he entered upon the discharge of his duties. He superintended the work of the foreman of the building, directing the elevator operator, the janitor, and the engineer. Such employees were hired and dischargd by him. In some instances he paid them twice a month by his personal check, afterward sending his bill to Webster and Sunderland, with 5 per cent. added for commission; and at other times he sent them statements for salaries and repairs, and afterward paid the claimants with funds received from his employers. According to his own testimony, he did not consider that they were working for him, but were servants of Webster and Sunderland, though he had charge of them and directed their work. If their services were not to be compensated by the owners of the building, he would not have considered it his obligation to pay them. Work of repairing the elevator was within the scope of Hanford's business as an electrical contractor. He could do the work himself or employ another electrician. In either case he would add 5 per cent. to the regular cost of the work for his commission. Plaintiff was an apprentice, and had been employed by Hanford in his electrical business for about nine months before the accident. He had also repaired the building in minor respects. He had been told by Hanford to look after the elevator and repair it, if necessary, when Hanford was not there. For work of this kind time slips were made out to the owners. Record of this work was kept separately from that done for Hanford. The cost of installing the cable on the day of plaintiff's injury was $12.50, which included Hanford's commission on the materials and labor used. This work was done without consultation with the owners. Hanford also testified that the owners had not directed the employment or discharge of servants.

An "independent contractor" has been defined to be "One who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of the work." 2 Words & Phrases (2d ed.) 1035. It is said that the existence or the absence of the right to control the work is the usual test of the relation, though the actual exercise of control is not essential. Cases in note to *City of Richmond v. Sitterding*, 101 Va. 354, 65 L. R. A. 445, at page 453. There are, however, other factors which may indicate the true relation. An owner's right to abandon or suspend work or to discharge the workman at pleasure may indicate dependency. *Cockran v. Rice*, 26 S. Dak. 393, Am. Ann. Cas. 1913B, 570, and note. Text-writers say: "If he never serves more than one person, there is usually a presumption that he has no independent occupation; but this presumption is not conclusive." Shearman and Redfield, Negligence (6th ed.) sec. 164. "Whether he works as contractor or as servant is a question of mingled law and fact, which it is scarcely possible to decide by any fixed rule which will accurately govern those cases where the one occupation borders closely upon the other." Shearman and Redfield, Negligence (6th ed.) sec. 165.

In *Brackett v. Lubke*, 4 Allen (Mass.) 138, Bigelow, C. J., said:

"The distinction on which all the cases turn is this: If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because

he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient."

One of the elements of the definition is an independent business or occupation, as distinguished from the dependent character of the service of an employee. Failure of the employer to select personally the employees or to direct the manner of performing the services does not necessarily indicate that the superintendent is an independent contractor. It was said in *Knicely v. West Virginia M. R. Co.*, 64 W. Va. 278, 17 L. R. A. n. s. 370:

"Nor is the manner in which the compensation is to be determined conclusive. If payment is made 'by the job' it is evidence of an independent contract, but only a circumstance. * * * How many conceivable instances of employment in which compensation is determined by the amount of work done instead of by the time employed, are there? Hundreds of thousands of 'piece workers' in factories, coal miners, paid by the bushel, railway engineers, paid according to mileage, and thousands of others. If that made an employee an independent contractor, it would be possible for employers to farm out all their work and with it their liability, by a very simple operation. Nor is it more than a mere circumstance, having more or less probative force, that the general employer has not, or has delegated, the power to hire and discharge the men."

It is the actual relation, and not the form, that controls. It was said in *Dibert v. Giebisch*, 144 Pac. (Or.) 1184: "The law with respect to the negligence of an independent contractor is formed upon the principle that one person should not be compelled to answer for the fault or neglect of another over whom he has no control. In actions to recover damages for injuries caused by the alleged negligence of the master, where the defense is that the carelessness was that of an independent contractor, a court will not hesitate carefully to scrutinize the substance of the contract and all the attending circumstances in order to determine the actual relation which the alleged master sustained to the person employed. The mere fact

of nominal employment by an independent contractor will not relieve the master of liability where the servant is in fact in his employ. *Nelson v. American Cement Plaster Co.*, 84 Kan. 797."

As supervisor of employees of the building and of the making of repairs, it cannot be said, as a matter of law, that Hanford was an independent contractor. His own testimony shows that, while he paid the employees, he did so only nominally; that, in fact, he hired and discharged them, but only as would any employee having such authority. It may be inferred that his relation with the owners of the building could be terminated at their pleasure. In looking after the elevator and electric lights, as shown by his letter of appointment, Hanford was merely continuing his previous service, for which he was paid $10 a month. As supervisor it may be said that he was not acting "in the pursuit of an independent business." The relation existing between defendants and Hanford is not evidenced wholly by the written instrument. It is affected by extrinsic facts and circumstances from which different deductions may reasonably be drawn. Under these conditions, whether Hanford was an independent contractor was a question for the jury. Cases cited in note to *City of Richmond v. Sitterding*, 101 Va. 354, 65 L. R. A. 445, at page 508.

In this view of the law and the evidence, the peremptory instruction was erroneous. The judgment of the trial court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

HAMER, J., not sitting.

LEONARD M. TRABERT ET AL., APPELLEES, V. BURDETTE BOYES, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18204.

1. Waters: OVERFLOW: DAMAGES: SPECIAL BENEFITS. Where a portion of a farm has been overflowed by the construction of a dam under a right obtained from the state, special benefits may be set off against incidental damages shown to have accrued to the residue of the tract.

2. ———: ———: ———: ———. And, in such a case, a valuable ice privilege which accrues to the owner of the residue of the tract, as a result of the construction of such dam, constitutes a special benefit.

APPEAL from the district court for Seward county: GEORGE F. CORCORAN, JUDGE. *Reversed.*

T. L. Norval and *J. J. Thomas,* for appellant.

B. F. Good and *Ed. P. Smith, contra.*

FAWCETT, J.

Appellant, who will be designated herein as defendant, obtained from the state of Nebraska the right to construct and maintain a dam across the Blue river, in Seward county, on his own land, just below certain contiguous land of plaintiffs, and to appropriate the waters of said stream for power purposes. The construction of the dam caused the waters of the river to overflow the land of plaintiffs. On March 20, 1911, defendant filed in the county court of Seward county a petition for the appointment of appraisers to assess plaintiffs' damages. Proceedings were duly had and an appraisement made, from which plaintiffs prosecuted an appeal to the district court for Seward county, where a trial was had to a jury. A verdict was returned assessing plaintiff's damages at $2,052, upon which judgment was rendered, and defendant appeals.

Defendant assigns six separate grounds of error. The first three and the sixth will not be discussed, as we do

not think the matters therein complained of could in any manner have prejudiced the defendant. The record shows that prior to the construction of the dam the unobstructed flow of the stream was such that ice in merchantable quantities did not form on plaintiffs' land. The construction of the dam overflowed the land of plaintiffs to such an extent as to create a millpond covering a number of acres. As to the land entirely taken no complaint is made. The controversy is as to the measure of damages for the land not actually taken.

The fourth and fifth assignments are: "(4) Where a portion of a farm has been taken under eminent domain, special benefits may be set off against incidental damages shown to have accrued to the residue of the tract. (5) A valuable ice privilege accrued to appellees by the construction of the dam, which did not exist before the appropriation. The right to take ice is appurtenant to the ownership of the bed of the river, which remains in appellees; and such privilege constituted a special benefit, proper to be considered in determining depreciation of the land not taken."

That the law is as stated in these two assignments is too well settled to require citation of authorities. Upon the trial below defendant attempted to prove by the witness Ashton that the pond created by the dam was a special benefit to plaintiffs by reason of the fact that from year to year the ice which formed on the pond was of great value to plaintiffs. The witness, upon being specifically interrogated, testified that he had knowledge of the use and benefits which plaintiffs would derive by reason of the construction of the dam. He was not cross-examined as to the extent of his knowledge. His competency to testify was therefore sufficiently established. Defendant then offered to prove by the witness the value of the ice privilege. This offer was repeated in a number of different forms. The offers were objected to, on the ground that no sufficient foundation had been laid; that proof of special benefits is incompetent in a condemnation proceeding and not a proper measure of damages, the true measure of dam-

ages being the difference between the fair market value of the property immediately before and immediately after the condemnation proceedings; that the offer related to a situation that might arise subsequent to the construction of the dam and long after the right to condemn had been obtained; that plaintiffs are not engaged in the ice business, are unfamiliar with it, and are not obliged to have such benefits thrust upon them; and that the testimony offered is incompetent, irrelevant and immaterial. These objections were all sustained. By the construction of the dam and the overflow of a portion of plaintiffs' land, defendant, if the testimony sought to be introduced by the witness be true, had created an appurtenance to plaintiffs' land which was worth $500 a year. This appurtenance to the adjoining land was created by the same act of defendant which took the other portion of the land. It was a special benefit to plaintiffs which defendant had a right to offset against any damage he had caused to that portion of plaintiffs' land not taken. Plaintiffs would not be required to engage in the ice business in order to obtain these special benefits. They were the owners of any ice privilege caused by the construction of the dam, and if that privilege had a market value, as a privilege, which could be sold or leased to others, or if plaintiffs themselves used the privilege thus created, in either case the value of the privilege would be a proper offset against the damages to the adjoining land. In so far as defendant was denied the right to offer proof upon this point, the court erred.

Plaintiffs further attempt to justify the action of the court by assailing the probable fairness of Mr. Ashton as a witness, on the ground that he is an interested party, and for other reasons urged. These matters would not justify the exclusion of the testimony of the witness. His fairness and credibility were for the determination of the jury. If he was a man of the character indicated, counsel for plaintiffs could doubtless have shown it on cross-examina-

tion, or, failing in that, have impeached the witness by other testimony.

It is next contended that the issue of special benefits was submitted to the jury; that there was, in fact, "some evidence" admitted by the court on that issue. The evidence referred to is the testimony of plaintiff Leonard Trabert. We think the fact that Mr. Trabert was permitted to testify upon this point is an aggravation rather than a mitigation of the error. Defendant could not be bound by this testimony of plaintiff when he attempted in a proper manner to refute it by other testimony.

In support of the fourth assignment defendant cites *Fremont, E. & M. V. R. Co. v. Whalen,* 11 Neb. 585, the second paragraph of the syllabus of which holds: "Special benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken." This is still the rule in this court. In support of assignment No. 5, defendant cites *Eidemiller Ice Co. v. Guthrie,* 42 Neb. 238, and numerous authorities from other states, all of which sustain the rule for which he contends.

For the reasons above given, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony herewith.

REVERSED.

HAMER, J., not sitting.

JOHN J. COLE, APPELLANT, V. JOHN D. COLE ET AL., APPELLEES.

FILED SEPTEMBER 20, 1915. No. 18244.

1. **Public Lands: HOMESTEAD ENTRY: DEVISE.** Where a homestead entryman dies, testate, prior to having completed the residence required to entitle him to obtain a patent to the land entered upon, leaving no widow, or minor children entitled to claim under section 2292, Rev. St. U. S., his devisee succeeds to his rights as entryman, and, upon completion of the fulfilment of the requirements of the homestead act, becomes the owner of such land and entitled to the patent therefor.

2. ———: ———: ———: QUIETING TITLE. And, in such case, the fact that when the devisee applies for a patent he fails to present the will of the decedent to the land department will not, in the absence of a plea and proof of facts constituting an estoppel, defeat his right to have his title quieted in the proper local court.

APPEAL from the district court for Logan county: HANSON M. GRIMES, JUDGE. *Reversed with directions.*

Mahoney & Kennedy and *Yale C. Holland,* for appellant.

R. S. Norval, contra.

FAWCETT, J.

On July 3, 1907, Eleazer Cole filed a homestead entry on government land in Logan county. On July 22, 1907, the answer of defendants alleges: "Said Eleazer Cole made and published his last will and testament, which was thereafter duly admitted to probate, in the county court of Logan county, Nebraska, and that, by the terms of said will, said Eleazer Cole bequeathed to the plaintiff, John J. Cole, all of the estate, both real and personal, of which he might die seized, at his decease." On June 20, 1908, he died. After his death John went upon the land and continued the residence thereon, initiated by his father, for the length of time, and made the improvements necessary to obtain a patent. He then made final proof and obtained a patent running to "The Heirs of Eleazer Cole." In making this application, he did not present the will to the United States land department, nor call the attention of the officials of the department to the fact that his father had left a will. The patent was issued May 16, 1912. On October 21, 1912, he commenced this suit to quiet title, making his sister and the children of a deceased brother parties defendant. He bases his claim on section 2291, Rev. St. U. S., which provides that after the expiration of five years from the date of entry, "if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee," may prove up and obtain title. The district court found that plaintiff

was not entitled to the relief sought, found that plaintiff and defendants were the heirs of Eleazer Cole, and are the owners of the land in the proportions of one-third to plaintiff, a son of Eleazer Cole, one-third to the defendant Martha Jane Wolff, a daughter, and the other third in equal parts to the other four defendants, who are the children of William P. Cole, a deceased son. From this decree plaintiff appeals.

The controlling question in the case is whether, under the section of the Revised Statutes of the United States, above cited, and under the facts in this case, Eleazer Cole had the power by will to devise his interest in the land in controversy, or his right to such land as an entryman, to the plaintiff to the exclusion of his daughter and grandchildren. It is argued in the brief of counsel for defendants that the will was admitted to probate by the county court without notice to the heirs of the decedent or a waiver of such notice by them. We do not think defendants are in a position to urge this point, as the quotation from the answer above set out shows an admission that the will was "duly admitted to probate." Without that admission the point would have to fail, for the reason that there is no evidence in the record that the heirs of the decedent were not all present at the time the will was probated, and consenting thereto.

In this condition of the record, we shall only consider the one point, viz.: Did Eleazer Cole have a devisable interest in the land, or in his entry thereof which he could pass by will? It is argued by defendants that the persons named in section 2291, Rev. St. U. S., as the ones who may complete the residence of an entryman who dies before he is entitled to a patent, do not take the property by descent; that they are entitled in their own right to complete the entry and receive a patent; that the statute vests in them, where there is no widow, upon their compliance with the prescribed regulations, all the rights to perfect and complete the entry and obtain a patent which the original entryman might have had if he had lived; that they become the donees or grantees of the government. If

section 2291 designated the widow and heirs only as the ones to whom the right to perfect and complete the entry and obtain a patent is given, as is the case under the Timber Culture Act (20 U. S. St. at Large, ch. 190, p. 114) and the Oregon Donation Act (9 U. S. St. at Large, ch. 76, p. 496), upon which some of the cases cited by defendants are based, the contention of defendants would be sound, but in the homestead act, and in that act only, the entryman's devisees are placed upon the same footing with his heirs. Note the language of the act: "or, if he be dead, his widow, or, in case of her death, his heirs or devisee." Rev. St. U. S. sec. 2291. The rule as to the binding force of decisions of the United States land department is well stated in the fourth paragraph of the syllabus, in *Ross v. Wright,* 29 Okla. 186, as follows: "While a decision of the land department on matters of law are not binding on the courts, they should not be annulled unless they are clearly erroneous." An examination of the decisions of the department of the interior and general land office, in cases relating to the public lands, shows clearly how the officers of the general government, in whom is vested the power to pass upon homestead entries and proofs of residence and to issue patents, construe section 2291: "The devisee of a homestead claimant is entitled to all the privileges that would descend to the heirs." In the case of *H. C. Dodge,* 1 Land Dec. 47. "In the event of a homesteader's death, final proof may be submitted by any one of the devisees, and, if such proof is found satisfactory, the certificate should issue in the name of the devisees of the said homesteader generally." *Brown v. Hughes' Devisees,* 17 Land Dec. 156. "Where an instrument purporting to be the last will and testament of a deceased homestead entryman is duly admitted to probate in the proper court, it will be recognized by the department as legally established." *Eberhardt v. Heirs of Selich,* 33 Land Dec. 342. In that case the entryman died about a year and a half after making his entry. He left a will devising all his property, and especially his interest in his homestead, to the Evangelical Lutheran Church. After a very full dis-

cussion the right of the church as devisee was sustained. In the case of *Ellen S. Eustance,* 40 Land Dec. 628, it is held: "Upon the death of a homestead entryman prior to the submission of final proof, leaving no widow, or minor children entitled to claim under section 2292, Rev. St., patent upon proof subsequently submitted will issue to his heirs generally, unless it appear from the record, prior to the issuance of patent, that the entryman made a will purporting to devise his interest in the entry, in which event patent will issue to his heirs or devisees, leaving it to the local courts to determine who the heirs are and what their interests may be.

"Where the land department upon the showing in the record then before it properly issued a patent to the heirs of a deceased entryman, and it subsequently developed that the entryman had left a will devising the entry, it will not accept a surrender of the patent accompanied by a deed executed by the devisee purporting to reconvey the land to the United States, and issue a new patent to the devisee of the entryman, but will leave it to the local courts to determine who under the patent already issued is entitled to the land."

As a reason why the department would not accept a surrender of the patent accompanied by a deed, reconveying the land to the United States, and issue a new patent to the devisee of the entryman, the opinion states (p. 630): "It is clear, therefore, that the department would have no authority to cancel the patent upon the present showing, and it would decline to cancel it upon any showing, as such action would involve an adjudication and finding as to who the heirs are, which the department declines to undertake. It would still be necessary, even if the old patent were canceled and a new one issued to the heirs or devisees, to resort to court procedure for determination as to the proper claimant or claimants under the patent and their respective interests. It is suggested that the proper procedure for the petitioner is, in case she claims to be the sole and only proper claimant of the land involved, to file a bill in equity in the proper local court to

have the title declared vested in her." This is precisely what plaintiff has done in the present suit.

Hays v. Wyatt, 19 Idaho, 544, is cited and copiously quoted from in plaintiff's brief. Defendants contend that the case is not an authority against them, for the reason that at the time of the entryman's death, in that case, he had completed his term of residence on the land and had given notice of the time when he would make his final proof, and that all that remained for him to do was to present his final proof when he would be entitled to a patent; that the right to a patent had therefore vested, and that under such circumstances it might be conceded that the entryman had a devisable interest. There is force in this construction of the cited case, but we are unable to agree with counsel's contention that those facts necessarily change the rule. The conditions with which the entryman was required to comply before he could obtain a patent had not all been complied with at the time he died. One of the conditions to obtaining a patent, which was just as essential as every other condition, was that he would present his final proof. Until that proof was presented no patent would ever issue, and, regardless of the fact that he may have lived upon the land the length of time required to entitle him to make final proof, if he failed to make such proof within two years thereafter, all his rights as an entryman would lapse. The title was still in the government. The right to demand a patent did not yet exist and would never exist until he made his final proof. He therefore had no more right to then devise the land than he would have had at any time prior thereto. The only thing which he could then devise would be his interest in the entry, or, stated another way, the rights which he had acquired as an entryman. If he could do that after full residence, but prior to final compliance with the statute, it seems to us he could do it at any time after filing his entry and entering upon the land. The reasoning of the court in the *Hays* case is so applicable here that we feel disposed to quote it more extendedly than is perhaps necessary. On page 552 it is said:

"The devisee is a person specially nominated by the decedent in his will to take his estate. He, as special nominee, takes precedence over the heirs, who only take the estate in the absence of a devise. However, appellant contends that the right to devise property under the provisions of said sections of the statute is limited to cases in which there are no heirs. We find no such limitation in the statute. There being no minor children, said section 2291 gives a priority in favor of the widow over the heirs or devisees, and section 2292 gives a priority in favor of infant children, and, in construing those two sections together, the supreme court of the United States held in *Bernier v. Bernier,* 147 U. S. 242, that the homestead would descend equally to minor and adult children. In that case there were five minors and five adults and no widow or devisee. Taking the provisions of the two sections as they stand, under that decision, they recognize the rights accruing to a homestead in the following manner: First, to the widow, if there be one; second, to the minor children, and, if the children are partly minors and partly adults, then in equal shares to each without regard to minority; third, to the devisee, if there be one; fourth, to the heirs."

The court then considers *Chapman v. Price,* 32 Kan. 446, relied upon by appellants in that case and by defendants in this, and clearly shows the distinction between that case and the case at bar. Further considering section 2291, it is said (p. 557):

"It further provided that, in case the entryman should leave no widow surviving him, the homestead should go to his 'heirs or devisee.' This left the matter entirely at the option of the entryman, in case he left no widow surviving him, as to whether he would leave his homestead to his heirs or his devisee. In other words, he could devise the homestead and thereby cut off the heirs. Congress, therefore, thought it necessary to add section 2292, and thereby prevent the entryman from devising the homestead away from the minor heirs in case he left no widow. But congress said nothing in this section about protecting heirs

who are over the age of 21 years. It therefore seems clear to us that congress intended, in case of the death of the homesteader, to first protect the widow, who would be the remaining head of the family and would be responsible for the protection and maintenance of the minor children; that, in case he left no widow surviving him, the homestead should then be left to those who would be dependent upon the patrimony for their protection and education. Congress was clearly not legislating by either section 2291 or section 2292 for the specific protection of heirs who had attained their majority—those who had arrived at their maturity and were therefore supposed in law to be able and capable of earning their own livelihood and taking care of themselves. After reaching that age, they would be in a position to take homesteads for themselves. So it appears to us that congress intended to leave it to the option and pleasure of the homesteader either to leave his homestead to his adult heirs without making any will, or, if he preferred to devise the homestead to some one else, he might do so, and thereby cut off the adult heirs."

Cooper v. Wilder, 111 Cal. 191, and *Walker v. Ehresman,* 79 Neb. 775, upon which the trial court evidently relied, were both cases under the Timber Culture Act, and *Hall v. Russell,* 101 U. S. 503, was under the Oregon Donation Act, in neither of which are devisees named in the class of persons who may succeed to the entryman's rights. Those cases were properly decided, but they are not authority here.

After a careful consideration of the question, we hold that, under section 2291, Eleazer Cole had full power to devise his interest in the homestead to plaintiff, and thus designate him as the one who should succeed to his rights as entryman and complete the fulfilment of the requirements of the homestead act and obtain the title and subsequent ownership of the land in controversy. The fact that when he applied for a patent he did not present the will to the land department cannot, in the absence of a plea and proof of facts constituting an estoppel, defeat his right to have his title quieted in the proper local court.

In thus holding, we feel that we are not only properly construing the homestead act, but that we are doing equity in this case. The stipulation of the parties shows that all were of full age at the date of the death of Eleazer Cole, and the undisputed testimony of plaintiff shows that his father, at the time of his death, was 82 years of age; that he had lived with plaintiff for ten years prior to his death; that during that time plaintiff contributed to his father's support, and that none of the defendants had so contributed; that none of the defendants lived upon the homestead after the father's death; that none of them even knew at that time that he had taken up this homestead; and that the first intimation he ever had that defendants claimed any interest in the land was when he brought this suit to quiet title.

For the reasons above given, the judgment of the district court is reversed and the cause remanded, with directions to enter a decree in favor of plaintiff, in accordance with the prayer of his petition.

REVERSED.

HAMER, J., not sitting.

MARY C. LEGAN, APPELLANT, V. FRANK SMITH, APPELLEE.

FILED SEPTEMBER 20, 1915. No. 18002.

OPINION on motion for rehearing of case reported, *ante,* p. 7. *Former opinion modified.*

SEDGWICK, J.

In our former opinion, *ante,* p. 7, it was held that the trial court was in error in sustaining the special appearance of the defendant, Frank Smith, and dismissing the action. This was upon the ground that he had made a general appearance in the case, and we are satisfied with that conclusion.

The record shows that Mrs. Milbourn admitted in her answer as garnishee that on a former occasion she had

testified that the legacy to Frank would be sent to him as soon as the case was settled. The evidence, some of which is quoted in our former opinion, shows beyond question that there had been negotiations between Frank and the other heirs which amounted to a waiver of any formal demand on Frank's part, and an understanding between them that he was entitled to the legacy under the will. The affidavit filed with the original petition sets out a copy of that portion of the will which gives Frank $3,500 and makes it a lien upon the land. The prayer of the petition itself does not ask for an equitable lien upon the land, but the affidavit and motion filed therewith ask for an attachment of Frank's interests, and the trial court would have allowed new parties and an amendment of the prayer of the petition, if it had been requested, so that a court of equity would have taken jurisdiction of the land itself for the purpose of enforcing the rights of the plaintiff. "Legacies may be attached in the hands of the devisee, for the legatee's debt, if they are charged upon real estate; but mere personal legacies cannot be attached." *Woodward's Executors v. Woodward,* 4 Halst. (N. J.) 115, 17 Am. Dec. 462. The plaintiff gave bond upon appeal to this court, which was duly approved. The bond does not contain the conditions necessary to retain the lien of the attachment in ordinary cases. But the order dissolving the attachment is a final order, and may be reversed by the court upon appeal, although the bond is not given. *Adams County Bank v. Morgan,* 26 Neb. 148. The record shows that the defendant, Frank Smith, was a nonresident of the state, which is a sufficient ground for attachment.

The merits of the plaintiff's claim against the defendant, Frank Smith, are not determined. The trial court will allow amendments of the petition, if desired, making all of the devisees parties, and investigate the plaintiff's claim carefully, and, if plaintiff's claim is established, it will be made a lien upon the interest of Frank Smith in the land devised to Mrs. Milbourn and Arthur H. Smith.

As above modified, our former decision is adhered to.

FORMER OPINION MODIFIED.

ROSE, J., dissents.

HAMER, J., not sitting.

LETTON, J., concurring, but dissenting as to directions.

This is purely an action at law to recover a money judgment, with ancillary proceedings in garnishment. The garnishees were discharged and the order discharging them was not superseded under section 7776 Rev. St. 1913. In this state of the case any property of Smith's in the hands of the garnishees was released from the custody of the law and the court lost power to direct the district court as to its disposition.

The directions in the former judgment of this court that the garnishees be required to appear and make further answer should be eliminated. In other respects it should be adhered to without modification.

MADISON NATIONAL BANK, APPELLEE, V. MORRIS GROSS, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18178.

1. **Banks and Banking: ACTION FOR INTEREST ON SPECIAL DEPOSIT: DEFENSE.** In an action against a bank to recover interest on a special deposit upon an alleged contract of the bank to pay such interest, it is immaterial as a defense on the part of the bank that the deposit was made pursuant to a stipulation by the depositor with other parties to maintain such deposit.

2. **Appeal: IMMATERIAL EVIDENCE.** It is not reversible error on the part of the trial court to refuse to allow any rebuttal of immaterial evidence. The remedy against such immaterial evidence is a motion to strike it out of the record.

3. ———: **TRIAL TO COURT: FINDINGS OF FACT.** In a law action tried by the court, the findings of fact have the same force and effect as the findings of a jury, and will not be reversed, if supported by substantially conflicting evidence, unless clearly wrong.

4. ———: **SUFFICIENCY OF EVIDENCE.** The evidence in this case, indicated in the opinion, is not such as to require us to say that the findings of the trial court are clearly wrong.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

G. W. Shields & Sons, for appellant.

Willis E. Reed, contra.

SEDGWICK, J.

The plaintiff began this action against the defendant in the district court for Madison county upon two promissory notes. The defendant answered admitting the notes, and alleged: That he, "on the 2d day of October, 1905, and for many years prior thereto, had large amounts of money upon deposit and subject to check in the Madison State Bank; that on and prior to the said 2d day of October, 1905, there was pending against this defendant, in the United States circuit court, for the district court of Nebraska, a certain lawsuit, wherein it appeared that this defendant might have to pay from $6,000 to $8,000, by virtue of a judgment in said court in said cause, in a few years thereafter; that for the purpose of meeting said judgment when it did come, and for the purpose of being sure that he would have the cash to satisfy the same when it was rendered, he desired to put $6,000 or $7,000 upon deposit, drawing the legal rate of interest, and he went to said Madison State Bank, with which bank he was then doing business, and stated his wishes and purposes with reference to said money to the officers of said bank. He offered to make a special deposit therein, which would not be drawn out for three or four years; that then and there he was informed that said bank would receive such deposit upon a special book and pay interest thereon, at the legal rate of interest; that then and there this defendant deposited with the said Madison State Bank the sum of $3,282, and on the 5th day of March, 1906, deposited with the said bank in said special account the sum of $171.60; then on the 17th day of November, 1906, this defendant deposited further in said special account the sum of $3,200, his total deposit being $6,653.60; that on or about the 7th day of January, 1911, a judgment was entered in said

cause against this defendant, and it became necessary for him to get his money at said bank for the purpose of paying the same upon said judgment. The defendant then and there went to said bank and asked for his deposits, with interest thereon at the legal rate of interest, and said bank refused to pay the same, but consented to pay the principal, without interest; that at said time it was absolutely necessary, to save a levy upon his property, for this defendant to have said money, so he gave a check upon said special account for the amount of the principal, without interest; that there was due upon said special account the sum of $1,928.97, which said defendant demanded of the said Madison State Bank, but that no part thereof has been paid, whereby the said plaintiff became, was, and is, indebted to the said defendant in the sum of $200, over and above the amount due upon said notes sued upon herein, together with interest thereon at the rate of 7 per cent. per annum, from the said 7th day of January, 1911."

The defendant asked judgment against the plaintiff for his $200 and interest. The plaintiff replied, admitting the deposit in a special account as alleged, but denying the agreement to pay interest thereon. The cause was tried by the court without a jury. The court found against the defendant on his set-off, and entered a judgment for the plaintiff for the amount of the notes sued upon, and the defendant has appealed.

The defendant then had an account in the Madison State Bank, which was afterwards reorganized as the Madison National Bank, and was continually borrowing money of the bank upon his promissory notes. He was also in litigation with his brothers in the federal court, and expected to be required to pay as the result of that litigation $6,000 or $8,000. He testified that the bank was familiar with his business and knew his situation, and that he told the cashier: "You know this is hanging over my head—that judgment—I don't know how it may come out; you can't tell how about it will go. I have got the money. I don't know how to invest it to bring money. I am a farmer; I can raise stock, but I don't know anything about the banking

business. Mr. Taylor went to work and fixed that for me." The cashier gave him another deposit book marked "Morris Gross, Special," and the defendant transferred $2,856.40 from his personal account to this special account, and afterwards paid more money into this special account. The question is whether he has proved that he is entitled to interest on this special account.

There is some evidence which is claimed tends to show that this special account was a fund in some manner under the control of the federal court, but this does not seem to be material. If this defendant provided the fund, and the bank contracted to pay interest thereon, the payment of such interest would clearly have benefited the defendant only, and it would seem that the bank would be bound by its contract with defendant to pay interest on the special deposit. It is therefore immaterial that the court first allowed plaintiff's evidence in regard to the control of this fund by the federal court, and afterwards, when it appeared that such evidence was immaterial, refused to allow the defendant to rebut the testimony. This is a law action tried to the court, and the findings of the court have the same force and effect as findings by a jury. They will not be set aside by this court for a mere difference of opinion as to the weight of the evidence, especially when the evidence is taken orally in the presence of the trial court. If the evidence is substantially conflicting, the judgment will not be reversed, unless clearly wrong.

The question is: Does the evidence so clearly prove that the bank agreed to pay interest on this open special deposit account that the findings of the trial court must be reversed as clearly wrong? The defendant was borrowing large sums of money at the bank from time to time while this money was on deposit. It seemed to him just that the high rate of interest he was paying to maintain this deposit should be partially, at least, offset by allowing interest on the deposit. He may have supposed that interest would be allowed. He testifies that his contract was made with Taylor, the cashier, and was afterwards confirmed by Mrs. Stuart, the president of the bank. He

is contradicted by both of these witnesses, who testify positively that no such agreement was made. The defendant's own testimony is not very clear and convincing. After he had testified as above quoted, he was questioned and answered as follows: "What did you say, if anything, to him about wishing to have this money earning interest? A. Yes. Q. What did you say? A. I said I wanted that money to earn money, to pay interest if I have to pay that judgment. Q. Is that all you stated to him about it at that time? A. Well, I says to him, 'I don't know how to go at this;' I says, 'I have an account in this book.' Q. At that time you borrowed money frequently from the bank? A. Yes, sir. Q. Large sums of money? A. Yes, sir. Q. What, if anything, did you say to him about your borrowing money from the bank at different times after that? A. I asked him, 'How you come to make out the account?' I have the book; it was 'Morris Gross, Special,' and transfer from this to that, and straighten me out, if this money is going to draw me interest. He said— Q. Examine exhibit 2, and state what that is. A. This was money that was drawing the interest I— Q. That is not what I want you to tell. Is this the book he gave you at that time? A. Yes; that is the other book; he dug it up. Q. Is this the way he proposed to make it draw interest for you? A. Yes; 'This is the way to do it,' he says, 'I will fix it for you; it will draw interest.' He went to work and took up the credits in there and put them in here, and he said, 'You will get your interest.'"

The two notes sued upon were given January 7, 1911, for $1,000 each, and two days later the balance of the special account, $6,487.76, was withdrawn from the bank upon the personal check of defendant, signed "Morris Gross, Special." At that time he demanded interest upon the special deposit, which was refused. As he was compelled to pay the judgment which had then been rendered against him in the federal court, he withdrew the principal of the deposit, without prejudice to his claim for interest thereon. There is nothing in this circumstance, nor in any other shown in the evidence, so far as we can see, that tends

to corroborate the defendant's testimony, and certainly the evidence of contract to pay interest on this open account is not such as to require us to say that the trial court is clearly wrong.

The judgment of the district court is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

CARL SORENSEN, ADMINISTRATOR, APPELLEE, V. SELDEN-BRECK CONSTRUCTION COMPANY, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18214.

1. **Master and Servant: INJURY TO SERVANT: LIABILITY.** A construction company which violates the law, and neglects the safeguards required in the keeping and use of inflammable coal oils, is guilty of negligence, and if such negligence is the proximate cause of injury to an employee, without contributory negligence on his part, the company will be liable in damages.

2. **Negligence: ACTION FOR DEATH: PRESUMPTION.** "If a person is killed through the negligence of another, and there is no evidence as to negligence or due care on the part of the deceased, the law presumes that the deceased was exercising reasonable and ordinary care at the time of his injury with a view to his safety." *Albrecht v. Morris*, 91 Neb. 442. But this presumption obtains only when there is no substantial evidence as to care or want of care on the part of the deceased. When there is such evidence, the presumption has no place in the case.

3. ———: ———: **INSTRUCTIONS: PRESUMPTION.** In such case, when the evidence is conflicting as to contributory negligence on the part of the deceased, an instruction that there is a presumption of due care on his part is erroneous. But if such instruction is that the presumption exists "in the absence of evidence to the contrary," and "until it is overthrown by a preponderance of the evidence," and from all of the instructions it does not appear that the jury might have understood that the presumption might counterbalance evidence of negligence on the part of the deceased, the giving of such instruction will not be held prejudicial so as to require a reversal.

4. **Damages.** Under the evidence in this case, a verdict for $15,000 is excessive, and plaintiff is required to remit $5,000 therefrom.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed on condition.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

H. S. Daniel and *John A. Moore, contra.*

SEDGWICK, J.

The Selden-Breck Construction Company was engaged in constructing a concrete building in the city of Omaha, and, the weather being very cold, it was necessary to take precautions against freezing, and for that purpose fires were built in two sheetiron firepots, called salamanders. These firepots were about 20 inches in diameter and 30 inches in height, and were placed four or five feet apart on a scaffold which was elevated above the concrete floor of the building. Samuel Larsen was in their employ, and assisted in building these fires. Soon afterwards, while he was standing between these two salamanders with the can of coal oil in his hand, there was an explosion, which covered him with the burning oil and caused his death. The plaintiff, as administrator of his estate, brings this action to recover damages, alleging that the death of the deceased was caused by the defendant's negligence. In the district court he recovered a verdict and judgment for $15,000 damages, and the defendant has appealed.

The following facts are admitted or well established by the evidence: Larsen was working under a foreman named Box. The material for building the fires was damp, and, as their custom had been, they used coal oil to saturate these materials before the fires were lighted. The defendant used both gasoline and kerosene in its business, and its custom was to keep two five-gallon cans of each in the building for use. The kerosene was ordinarily kept in two white cans, and the gasoline in two red cans. Shortly before this accident the defendant had ordered five gallons

of kerosene and the man who delivered the kerosene, not being able readily to find the kerosene can, and one of the gasoline cans being empty, put the kerosene in a gasoline can. He informed the foreman Box that he had done so, and on this occasion the foreman, intending to take the kerosene, which he knew had been put in the gasoline can, took a can of oil and gave it to the deceased, supposing it was kerosene, and instructed him to saturate the material for the fire with it. This the deceased did, and after the fire was lighted the deceased was standing with this can of oil between the two salamanders, as before stated, when the explosion occurred.

There is evidence that it would be dangerous to hold an open can of gasoline so near these fires as this can was being held, since the fumes of the gasoline might escape, and, coming in contact with the flames, an explosion would be caused. The defendant was clearly guilty of negligence in keeping the gasoline and kerosene as it did, and if this negligence resulted in furnishing the deceased with gasoline which he, without fault on his part, supposed to be kerosene, and the explosion was caused by the vapor of the gasoline escaping from the can, which could not happen in the use of kerosene, the negligence of defendant was the proximate cause of the accident.

The defendant insists that it was kerosene which was given the deceased, and that he was pouring the oil upon the lighted fire, which caused the explosion; that he had been expressly warned against putting kerosene upon lighted fires, and that the deceased's own wilful negligence was the cause of the accident. We are satisfied that there is evidence in the record tending to support this contention of the defendant, and there are but two questions for us to consider: First, whether the issue so formed was properly submitted to the jury; and, second, if so, whether the damages allowed are excessive.

It will be seen that the plaintiff contends, and in order to recover must prove, that the oil given to the deceased by the foreman was gasoline, and that while the deceased was using it as he was directed by the foreman to do, and

as it would be safe to do with kerosene, the vapor of gasoline escaped from the can and came in contact with the fire that had been lighted in the salamanders, which caused the explosion. The defendant denies this, and contends that it was kerosene, and not gasoline, which was given deceased, to use, and that the deceased was attempting to pour this oil upon the fire, which caused the explosion. Of course, the plaintiff has the burden of proof upon the issue so presented. The proof is not conclusive that the can handed to deceased by the foreman contained gasoline, nor that vapor escaping from the can was the cause of the explosion, rather than an attempt of the deceased to replenish the fire with oil. No witness saw the deceased at the instant of the explosion. We will not undertake to recite the evidence of the circumstances and conditions from which this controverted point must be determined. It is sufficient to say that the evidence was such as to require the court to submit the issue to the jury. The court properly submitted the contention of the plaintiff, that the can contained gasoline, and that the vapor escaping from the can caused the explosion, and then instructed the jury: "The defendant having alleged that the deceased's injuries and death were caused by his own negligence in pouring coal oil on a live fire, the burden of proof is upon the defendant to establish this allegation by a preponderance of the testimony. Now, this testimony need not come solely from the witnesses for the defendant; but if, from a preponderance of all the testimony, the defendant has established this allegation, then your verdict should be for the defendant." Also: "There is a presumption, in the absence of evidence to the contrary, that the deceased exercised due care and caution for his own safety, and, in considering the issue of negligence of the deceased, you should give the plaintiff the benefit of this presumption, until it is overthrown by a preponderance of the evidence."

It is conceded that these instructions correctly state abstract propositions of law, but it is urged that, as stated, they are not applicable to the facts in this case, and were therefore misleading and prejudicial. It was not con-

tended that the defendant's allegations as to the manner of causing the explosion were in the nature of a denial that the can contained gasoline, and that the explosion was caused by vapor of the oil escaping therefrom, and that therefore the burden would be upon plaintiff to prove by a preponderance of the evidence that the explosion was caused by vapor from gasoline in the can which had been furnished the deceased, and not otherwise. The case was tried by both parties, as stated by defendant in its brief, upon the issue "whether the deceased, Larsen, had poured oil on the live fire, which the undisputed evidence shows had been lighted in the salamanders. * * * There need be no dispute that the burden of proof was upon the defendant to establish by a preponderance of the evidence that the deceased did pour the oil on the live fire and thereby caused his death." The defendant's contention appears to be that it was prejudicial to defendant to follow the instruction which submitted that issue with the instruction, above quoted, that the presumption is "that the deceased exercised due care and caution for his own safety."

It must be conceded that this instruction was unnecessary in this case. It is only "in the absence of evidence to the contrary" that the presumption obtains, and, when the evidence is substantially conflicting upon that point, no such instruction as to presumption of care should be given. The supreme court of Missouri said: "There is no room for the presumption of due care in this case. Such presumption is a presumption of fact, and upon the appearance of the facts in evidence the presumption takes flight, and no longer has a place in the case. *Higgins v. St. L. & S. R. Co.*, 197 Mo. 318; *Tetwiler v. St. L., I. M. & S. R. Co.*, 242 Mo. 178; *Morton v. Heidorn*, 135 Mo. 608, 617, and cases therein cited. * * * This is a presumption indulged by the law *ex necessitate*. When the man is dead and there is no evidence as to his conduct at the time of the accident, the law, through the very necessity of the case, indulges the presumption of due care. * * * When the facts themselves are in evidence, there is no place for

a presumption as to those facts. The presumption is only indulged in the absence of evidence as to the fact of due care. * * * Such proof of the facts is the matter to be weighed by the jury, and there should not be added in the scale a presumption of fact which has been displaced by the proof of the fact." *Burge v. Wabash R. Co.*, 244 Mo. 76, 94.

In *Grimm v. Omaha Electric Light & Power Co.*, 79 Neb. 387, 396, this court quoted the following from the opinion of Caldwell, J., in *Northern P. R. Co. v. Spike*, 121 Fed. 44: "The presumption arising from this natural instinct of self-preservation stands in the place of positive evidence, and is sufficient to warrant a recovery, in the absence of countervailing testimony. * * * Nor is this presumption applied only when no one witnesses the accident. It has its application in all cases, and may be strong enough to overcome the testimony of any eye-witness. * * * This principle has been repeatedly affirmed and applied by the supreme court of the United States." This statement of the federal court was afterwards repudiated by the same court. In *Wabash R. Co. v. De Tar*, 141 Fed. 932, the court said: "As the presumption reflects only the ordinary or usual conduct of men, and is at utter variance with what they sometimes do, it is not entitled to probative force or weight as affirmative or positive evidence, but only to the force or effect of a rebuttable inference of fact which must necessarily yield to credible evidence of the actual occurrence. * * * It is true that in the opinion of this court in *Northern P. R. Co. v. Spike*, 121 Fed. 44, there are expressions indicating that the presumption of the exercise of due care and caution 'has its application in all cases,' and is entitled to weight as affirmative evidence, but as these expressions appear to have gone beyond what was necessary to a decision of that case, and to ascribe to the presumption greater force and influence than in principle should be accorded to it, they cannot be permitted to control the decision of other cases."

In a later case, *Albrecht v. Morris*, 91 Neb. 442, the correct rule is stated in the syllabus: "If a person is killed

through the negligence of another, and there is no evidence as to negligence or due care on the part of the deceased, the law presumes that the deceased was exercising reasonable and ordinary care at the time of his injury with a view to his safety."

But the instruction in this case tells the jury that a preponderance of the evidence that deceased did not exercise due care will overthrow the presumption. The instruction might have been further limited and explained, and no doubt would have been, if further instruction of that kind had been requested. It is not clear that the jury must have understood from these two instructions that the presumption would counterbalance competent evidence of contributory negligence. The question of due care on the part of deceased was to be determined by a preponderance of the evidence on that point. It is not so clear that the jury were misled by this instruction, and that the defendant was prejudiced thereby, as to require a reversal.

The jury rendered a verdict for $15,000 in favor of the plaintiff. It is contended that this is excessive. The deceased was about 27 years of age. He had been continually working as a laborer, and his wages were about $15 a week. He left a widow about 22 years of age and an infant child. If one-third of his wages were used for his own support, and he contributed about two-thirds towards the support of his wife and child, this would amount to a little over $500 a year. In *Grimm v. Omaha Electric Light & Power Co., supra,* and in *Armstrong v. Union Stock Yards Co.,* 93 Neb. 258, the amount recovered in each case was $7,000, and this court refused to set aside the verdict in either case as excessive. In one of these cases the deceased was a little younger, and in the other the deceased was a little older, than the deceased in the case at bar. There were perhaps other circumstances in the cases referred to that might influence the amount of the recovery, but neither of those cases affords a precedent justifying the amount of recovery in this case. When we consider the present worth of an annuity of $500 a year during the expectancy of the deceased, it is apparent that

this evidence will not support a verdict for more than $10,000.

The judgment of the district court is therefore reversed and the cause remanded, unless the plaintiff enters a remittitur in this court of $5,000 within 30 days. If such remittitur is entered, the judgment of the district court will be affirmed.

AFFIRMED ON CONDITION.

HAMER, J., not sitting.

MARION MAY OLSON GIBBONS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18219.

1. **Trial: WITNESSES: CREDIBILITY: QUESTION FOR JURY.** If a witness admits that she has told untruths out of court and has before the trial stated some of the matters in controversy entirely different from her testimony in court, it is still for the jury to determine as to her veracity when under oath and as to the credibility of her testimony.
2. **Evidence: SUFFICIENCY.** When the plaintiff's testimony is not contradicted or explained by defendant, although the facts testified to by her are equally within the knowledge of the defendant's agents, her testimony, if plain and unequivocal, and consistent with the established facts, should be considered as establishing such facts so testified to by her.
3. **Evidence of Value.** The owner of property is generally admitted to testify as to its value, but when the property has a well-known market value, and the owner has not purchased it, nor any property of a similar character, and does not show any means of knowledge of its value, her testimony upon that point has little weight, and is only admitted in the absence of better evidence. If, however, the property is shown to have some value, and the negligence of the defendant has exposed it to loss under conditions which make it impossible to furnish any other evidence of value, the defendant cannot escape liability if any evidence tending to prove value can be obtained. Under such circumstances, the owner's estimate of value must be received, and, being uncontradicted, will support a verdict in her favor.

4. Carriers: BAGGAGE. "Baggage" includes, "not only articles of apparel, whether for use or ornament, but also other articles, the use of which is personal to the traveler, and the necessity or convenience of which has arisen from the fact of his journeying." 5 R. C. L., p. 158.

5. ———: ———: QUESTION OF LAW AND FACT. The question as to what is properly baggage for which the carrier is liable as insurer is a mixed question of law and fact. If the evidence is without substantial conflict, it is ordinarily one of law, but, if it depends upon facts from which reasonable men might draw either conclusion, the question is for the jury, under proper instructions.

6. ———: LOSS OF PROPERTY: LIABILITY. If the property is not properly baggage, the carrier would still be liable if its loss was caused by its own gross negligence, but not if it is caused by accident, or the act of some third party, or even by ordinary negligence of the defendant.

7. ———: ———: MEASURE OF DAMAGES. When articles of baggage have no market value, as clothing that has been in the use of the owner, and articles of that nature, the value to the owner may be proved; but an ordinary diamond of good quality has a market value, and that is the measure of damage for its loss, in the absence of evidence that it has a different and peculiar value to the owner.

8. ———: ———: ———: INSTRUCTIONS. When the articles sued for have a certain market value, and no special value to the owner, it is erroneous to instruct the jury that the measure of damages is "what they were worth to the owner," and when the evidence as to value is meager, and uncertain as to whether it relates to the market value or some supposed peculiar value to the owner, such instruction is prejudicial, and will require a reversal.

APPEAL from the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Reversed.*

E. E. Whitted and *Wright & Mothersead,* for appellant.

Morrow & Morrow, contra.

SEDGWICK, J.

The plaintiff bought a ticket at Home City, a station on the Union Pacific, near Topeka, Kansas, for passage to Grand Island, Nebraska. At Grand Island she caused her trunk, which had been checked as baggage, to be transferred to the station of the defendant company, and there bought a ticket for passage to Scottsbluff, Nebraska.

She requested the defendant's agent to check her trunk to Scottsbluff, and the agent gave her a check therefor; but, on her arrival at Scottsbluff, she was unable to get her trunk, and when she received it, after some delay, she insisted that it had been opened and certain articles taken therefrom. She brought this action in the district court for Scott's Bluff county to recover the value of the articles. There was a verdict and judgment in her favor, and defendant has appealed.

The defendant offered no evidence. The case rested upon the testimony of the plaintiff, her husband, and sister. The testimony of the plaintiff's husband and sister was very meager, amounting only to confirmation of the plaintiff as to her ownership of a diamond, and one or two other particulars testified to by plaintiff, so that the plaintiff's case depends substantially upon her own testimony.

The defendant contends that the plaintiff's admitted untruthfulness so impairs the weight of her testimony as to destroy her evidence. She testifies that she described the diamond to her attorney to enable him to attempt to find it, and that she told him it was a "diamond with a very small chip off of the bottom of it." She was then asked, "Then, it did have a chip off of it, did it not?" and answered, "No, sir; it did not. * * * Q. Is that the first time you ever lied about that diamond? A. No, sir. Q. When did you first commence lying about it? A. Well, a young man asked me, a while after my husband died, what I did with his diamond, and I says, 'I gave it away.' Q. That is when you first began lying about it? A. Yes, sir; because there were too many questions asked me about it. Q. And you kept that up until you met Mr. Morrow? A. I did, if questions came up. Q. And the only time you ever told the truth about it was when you were suing the railroad company about it? A. No, sir. Q. When did you begin telling the truth about it? A. Oh, I have told the truth about it lots of times. Q. About half and half, you think? A. No, sir. Q. You think the truth is a little bit in your favor, do you? A. Yes, sir."

It was for the jury to determine as to the veracity of this witness when under oath. When this witness testified to matters that were equally within the knowledge of the defendant's agents, and the defendant did not see fit to offer any testimony contradicting or explaining the evidence of the plaintiff, her evidence as to such matters must be taken as establishing the fact so testified to. Of this character was her testimony that the defendant's agent had made a mistake in checking the trunk, and that the check given her called for another trunk altogether, and that her trunk had been miscarried and did not arrive at Scottsbluff until several days after it should have arrived, and also her testimony as to the condition of the trunk and its fastenings when it was delivered to her at Scottsbluff. She testified that when she delivered the trunk to the defendant at Grand Island it was securely "roped twice around endways and twice around the center, and when it arrived in Scottsbluff it was once around the trunk endways and three times around the middle;" also, "one corner on the bottom of the trunk was broken off; the bottom board was split off about half way across, and it had been unroped." This and similar testimony as to the condition of the trunk was not denied by the defendant. The negligence of the defendant which exposed plaintiff's property to danger of loss, not having been denied by defendant when the facts were peculiarly within the knowledge of its agents, must be regarded as fully established. The owner of property is generally admitted to testify as to its value, but when the property has a well-known market value, and the owner has not purchased it, nor any property of a similar character, and does not show any means of knowledge of its value, her testimony upon that point has little weight. Her testimony, therefore, as to its value could only be admitted in the absence of better evidence. If, however, the property is shown to have some value, and the negligence of the defendant has exposed it to loss under conditions which make it impossible to furnish any other evidence of value, the defendant cannot escape liability, if any evidence tending to prove value can be ob-

tained. Under such circumstances, the owner's estimate of value must be received, and being uncontradicted, will support a verdict in her favor.

It is contended that the diamond was not properly baggage, and that the defendant, therefore, would not be liable as an insurer thereof. There is an exhaustive treatise and citation of authorities upon this subject in 5 R. C. L. p. 158 *et seq.*, under the title of "What Constitutes Baggage." It is said: "In general the term includes, not only articles of apparel, whether for use or ornament, but also other articles, the use of which is personal to the traveler, and the necessity or convenience of which has arisen from the fact of his journeying. * * * As defined in the preceding paragraph, baggage has been held to include wearing apparel, even of extraordinary value, under certain conditions of life. * * * Articles of extraordinary value are not properly classed as baggage, as, for example, papers or memoranda of great and special importance in business, or jewelry of exceptional value." The plaintiff was living with her husband at Scottsbluff, Nebraska. He was "first press foreman in sugar factory." He worked by the day, but the evidence is meager as to his earnings and their style of living. The plaintiff had been visiting her sister in Kansas for a month or more. She testified: "Q. State what you used these articles for, Mrs. Gibbons. A. To wear. Q. State whether or not you had worn any of these articles, or all of them, on this trip. A. I wore them at different times. A. Had you worn this diamond? A. Yes, sir." On cross-examination she was asked: "Q. Now, you may state to the jury whether or not you wore this diamond yourself. (Objected to as repetition. Overruled. Exception.) A. Yes, sir; I have. Q. State whether or not you wore it on this trip. A. I did." On the other hand, her sister, who testified that she had seen the diamond frequently, was asked: "Q. State to the jury whether or not you ever saw Mrs. Gibbons wearing this diamond. A. No; I never saw Mrs. Gibbons wear it. I have seen Mr. Olson wear it. Q. That was Mrs. Gibbon's first husband? A. Yes, sir." The plaintiff's hus-

band, with whom she had lived about seven years, testified that he had seen the diamond once, seven years before the trial, and had never seen it since.

The question is one of law and fact. If the evidence is without substantial conflict that the article in question is not properly baggage for which the company would be liable as insurer, the court should so instruct the jury; but, if it depends upon facts from which reasonable men might draw either conclusion, the question is for the jury, under proper instructions. The evidence is not so clear, as to require the court to withdraw the question from the jury. If the diamond was not properly baggage, the company would still be liable, if its loss was caused by its own gross negligence, but not if it is caused by accident, or the act of some third party, or even by ordinary negligence of the defendant.

The court instructed the jury: "The measure of damage for the loss of the articles is to be determined by what they were worth to the owner, and not by what they would bring on the market, the value to be measured at the place of destination." This instruction was clearly erroneous under the evidence in this case. The plaintiff testified to the value of some of the articles lost, which apparently would have no market value, and as to such this instruction was applicable; but a diamond of the value that this diamond is alleged to be would, in the hands of persons competent to judge, have a certain market value, and there is no evidence in the record indicating that it possessed any other or different value, or any value peculiar to the plaintiff or her use of it. The plaintiff contends in the brief that, "if the market value of the articles sued upon and the value to the owner were at all different, the value to the owner would certainly be greater than the market value; and if the instruction required the appellee to prove the value to the owner, and only the market value was proved, then the fact that only the market value was proved is to the advantage of the appellant in this case, and the error, if any, is without prejudice." But if the value to the owner "would certainly be greater than the

market value," the jury, under this instruction, would be allowed to find a greater value than the market value, which would be, of course, erroneous.

When the evidence is so meager and so uncertain as to the value of the articles sued for, a correct statement of the law to the jury as to their finding of value is very important, and this instruction was peculiarly prejudicial to the defendant.

The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

HAMER, J., not sitting.

SWENSON BROTHERS COMPANY, APPELLEE, V. COMMERCIAL STATE BANK, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 18226.

1. **Appeal: PLEADING: NEW CAUSE OF ACTION.** The same cause of action must be presented and tried upon appeal that was tried in the court below; but "to plead an issuable fact in the appellate court that was not pleaded in the lower court is not necessarily pleading a new cause of action."
2. **Bills and Notes: "CHECK."** "A 'check' is a bill of exchange drawn on a bank payable on demand." Rev. St. 1913, sec. 5502.
3. ———: **ACCEPTANCE.** "The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill." Rev. St. 1913, sec. 5450.
4. ———: ———. "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value." Rev. St. 1913, sec. 5451.
5. **Banks and Banking: POSTDATED CHECK: ACCEPTANCE: AUTHORITY OF BANK PRESIDENT.** If a postdated check is, before the day of its date, delivered to the bank upon which it is drawn, and there is no money of the maker of the check on deposit in the bank at the time, the president of the bank has no authority by virtue of his office to bind the bank to pay to the payee the amount of the check on the day of its date.

6. ———: ———: ———: ———. The president of a bank will not be presumed to be authorized by virtue of his office to bind the bank to make good the default of another.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed and dismissed.*

J. C. Robinson, for appellant.

H. E. Burkett, contra.

SEDGWICK, J.

This plaintiff held a claim for adjustment against the Shilton Trading Company, amounting to $150, and on the 28th day of June, 1910, that company executed and delivered to the plaintiff two checks upon the defendant, Commercial State Bank of Coleridge. One check for $100 was dated June 30, 1910, and the other check for $50 was dated July 2, 1910. H. F. Swenson represented the plaintiff in the transaction, and he testified upon the trial that the checks were given him with the understanding "that we could arrange with the bank that these checks should be taken care of by the bank on certain dates." Mr. Swenson and A. E. Severence, who was the manager of the Shilton Trading Company, went to the defendant bank and presented the checks to George A. Gray, the president of the bank. These three men discussed the situation together, and the result was that the checks were left with the bank, and the president of the bank executed and delivered to Mr. Swenson the following writing: "We will send draft for $100 on Friday, 30th June, 1910, and draft for $50 on Tuesday, July 2d, 1910, as per checks of Shilton Trading Company of Coleridge, Nebraska, left in Com'l State Bank, Coleridge, by Mr. Swenson June 28, 1910. George A. Gray, Pt." Afterwards the bank sent to Mr. Swenson a draft for $100, as stated in the writing. The bank failed to remit for the $50, and the plaintiff brought this action against the bank in the county court of Cedar county to recover the $50 and interest. The plaintiff appealed to the district court for that county, where he re-

covered a judgment for the $50 and interest, from which the defendant has appealed to this court.

1. In the county court the plaintiff filed a bill of particulars, alleging, among other things, the execution of the checks, and the execution and delivery of the writing by the president of the bank, but the bill of particulars did not contain the allegation that "the acceptance was written by the defendant on a slip of paper other and different from that upon which the aforesaid checks were written, and said acceptance was by the defendant shown and delivered to the plaintiff, and the plaintiff on the faith of said acceptance received the aforesaid checks for value." In the district court this allegation was added to the petition, and the defendant moved to strike this allegation from the petition, on the ground that it "constitutes and is a material variance and departure from any issue presented to or pleaded in the lower court." The court overruled this motion, and the defendant now strenuously insists that the court erred in this ruling. There is no ground for this contention. "To plead an issuable fact in the appellate court that was not pleaded in the lower court is not necessarily pleading a new cause of action." *North & Co. v. Angelo,* 75 Neb. 381. The rule is that the same cause of action must be presented and tried upon an appeal that was tried in the court below. The cause of action in this case was the checks and the writing executed by the president of the bank, and adding an issuable fact in the appellate court was not pleading a new cause of action.

2. The alleged agreement of the defendant bank was in writing, and a large amount of evidence was admitted by the court bearing upon the question whether the plaintiff knew that there were no funds of the maker of the check on deposit in the bank at the time the checks were made and the writing executed by the president of the bank. There are authorities that hold that the acceptance of a check by a bank when there are no funds of the maker in the bank is void, the president of the bank having no authority to make such acceptance. These authorities make

exception to the rule when the payee of the check parts with property on the faith of the acceptance, and is without notice that the maker of the check has no money on deposit in the bank subject to check at the time. "Where a postdated check is certified by the cashier of the bank on which it is drawn, to be 'good' by indorsement thereon, before the day of its date, the instrument, upon its very face, communicates facts and information to persons receiving the same that the cashier, in making such certification, was not acting within the known limits of his power, and that he was clearly exceeding them." *Clarke Nat. Bank v. Bank of Albion,* 52 Barb. (N. Y.) 592. This case is cited with approval in 1 Morse, Banks and Banking (4th ed.) sec. 413, and the author says: "When a postdated check is certified before maturity, it carries notice to all that the certification was beyond the officer's authority." 3 R. C. L. p. 446. This principle is decisive of this case. This transaction was not ordinary banking business.

"A 'check' is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check." Rev. St. 1913, sec. 5502.

"The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored." Rev. St. 1913, sec. 5450.

"Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value." Rev. St. 1913, sec. 5451.

These checks were not presented for certification and retained by the payee. They were delivered to the bank. The acceptance, therefore, does not bind the acceptor in favor of this plaintiff, who did not receive the checks for value on the faith of the acceptance. The president of the bank undertook to guarantee that the checks would be made good by the maker thereof, and that the bank would

pay the amount to the payee of the check. The payee not only had notice of this, but participated in this arrangement, and was bound to know that such a transaction was beyond the power and authority of the president of the bank. The district court should have directed a verdict for the defendant.

The judgment of the district court is reversed, and the case dismissed.

REVERSED AND DISMISSED.

HAMER, J., not sitting.

IN RE ESTATE OF JOHN LANDON.

JENNIE LAYTON, ADMINISTRATRIX, APPELLEE, V. ARTHUR C. STEM, ADMINISTRATOR, APPELLANT.

FILED SEPTEMBER 20, 1915. No. 19132.

Appeal: DISMISSAL. An appeal to this court will, upon motion, be dismissed as frivolous, when the only ruling complained of is clearly right and plainly in accordance with the former decisions of this court.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Appeal dismissed.*

Crites & Sons, for appellant.

Allen G. Fisher and *William P. Rooney, contra.*

SEDGWICK, J.

John Landon deposited money in a bank, and took a certificate of deposit therefor, payable to himself. Afterwards, being ill, and, as he supposed, about to die, he went to the bank and told the cashier that he wanted to fix the deposit so that his wife could draw the money. The cashier thereupon wrote in the certificate after Mr. Landon's name the words "or wife," so that it read, payable to "himself or wife." Mr. Landon locked the certificate in a box, told his wife what he had done, and handed her the key

to the box, with the statement that he wanted her to have the money and she could get it at any time by presenting the certificate. This was a gift of the money to his wife. *Foster v. Murphy,* 76 Neb. 576. Mr. Landon soon after died, and a little later his wife died also. The district court decided that the administratrix of Mrs. Landon's estate was entitled to the certificate of deposit, and the administrator of Mr. Landon's estate appealed to this court. A motion to dismiss the appeal as frivolous was sustained, because the record shows affirmatively that the only ruling complained of is clearly right and plainly in accordance with the former decisions of this court. *In re Williams,* 97 Neb. 726.

APPEAL DISMISSED.

HAMER, J., not sitting.

MARY J. DAVIS, APPELLEE, V. PATRICK MANNING, APPELLANT.

FILED OCTOBER 2, 1915. No. 17926.

1. **Landlord and Tenant:** DEFECTIVE PREMISES: LIABILITY OF LANDLORD. The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud on the part of the lessor, the lessee cannot recover for personal injuries received through latent defects therein, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor.
2. **Paragraphs** 3 and 4 of our former opinion, *Davis v. Manning,* 97 Neb. 658, overruled.

REHEARING of case reported in 97 Neb. 658. *Former judgment of affirmance vacated, and judgment of district court reversed.*

MORRISSEY, C. J.

This cause is before us on rehearing; the original opinion being found in 97 Neb. 658. The only question which will be given consideration at this time is that of the lia-

bility of landlords, covered by paragraph 3 of the syllabus in our former opinion, and embodied in instructions numbered 4 and 9 given by the trial court. The action is one for damages by a tenant against her landlord for injuries sustained because of what is alleged to be a defective condition of the floor. The house had been erected 25 or 30 years before the date of the accident, and had been used all these years for a dwelling, plaintiff having been a tenant therein on two separate occasions prior to her last tenancy, which began several months prior to the date of the injury. When the house was built there was a cellar constructed under the main part thereof, and there was a brick wall laid, upon which the kitchen rested. No openings were left for ventilators, and it is contended that, because of this failure, the kitchen floor became affected by dry rot on the lower side, while the upper surface of the boards remained sound; that plaintiff had no knowledge of this condition, and that while engaged in her regular household work she stepped upon a board, which had become so rotten that it was unable to support her weight, and her foot passed through the floor and she suffered the injuries complained of.

It is claimed that, if defendant did not have actual knowledge of the condition of the floor, he ought to have known of the dangerous condition, and the court instructed the jury: "(4) In order to recover in this case, the plaintiff must show by a preponderance of the evidence the following facts: * * * That the defendant knew of said defect in said kitchen floor at the time of the last leasing of said premises, or should have known of the defect in said floor by the exercise of reasonable care in observing the natural law of decay of said kitchen floor; that the plaintiff did not know of the defect in said floor, and that the same was latent or hidden and could not have been discovered by the plaintiff by using ordinary care and caution in endeavoring to discover the same."

By paragraph 9, the court instructed the jury that defendant could not be held liable for damages, "unless * * * the kitchen floor was in fact in a dangerous and

defective condition, and that the landlord knew that said floor was in said dangerous and defective condition."

By these paragraphs two inconsistent rules were submitted to the jury, the former saying that defendant was liable if he knew or "should have known" of the defect, while the latter paragraph held defendant liable only in case he had actual knowledge of the defective condition. If the rule laid down in paragraph 4 is correct, the giving of paragraph 9 was without prejudice to defendant; but, if the rule stated in paragraph 4 is incorrect, it was not cured by the giving of paragraph 9. Plaintiff does not seriously contend that defendant had actual knowledge of the defective condition of the floor, but the right to recover is based on the theory that, defendant having built the house for his own use, and being present when the work was done, and knowing that the kitchen was built over a dark, damp hole, without any provision being made for ventilation, was bound to take notice of the "natural law of decay," and therefore was presumed to know that 25 or 30 years after the erection of the house and the laying of this floor, which was of the best quality of white pine, an inch or more in thickness, the floor was in a defective and dangerous condition; and that, under the rule laid down in paragraph 4 of the court's instructions, he is liable for the injury.

There is no evidence to show that defendant had actual knowledge of the defective condition alleged, and it is not seriously contended by plaintiff that there is any evidence to support the rule laid down in paragraph 9. From the very nature of the case, plaintiff must have known the condition of the floor better than did the defendant. She had lived in the house before, and for several months prior to the accident she occupied that kitchen. She knew, or might have known, the age of the house. The record shows that it was old and dilapidated in appearance. It was plainly to be seen that there were no ventilators under the kitchen, and the tenant must be held to have equal knowledge of the law of decay as the landlord. There was no concealment of defects actually known to the landlord.

The cases covering the question under consideration are found in a note to *Walsh v. Schmidt,* 206 Mass. 405, in 34 L. R. A. n. s. 798, and, with a single exception, they show the rule to be that, in the absence of warranty, deceit or fraud, a landlord is not liable for injuries sustained by a tenant from defects in the demised premises, unless he had actual knowledge at the time of the lease of such defective condition. *Kurtz v. Pauly,* 158 Wis. 534. The exception is to be found in *Hines v. Willcox,* 96 Tenn. 148, 34 L. R. A. 824, and, on rehearing, *Willcox v. Hines,* 100 Tenn. 538, 41 L. R. A. 278, in which case it is held that the landlord is liable for personal injuries received by a tenant from defective premises, not only where he has actual knowledge of the defect, but also if by the exercise of reasonable care and diligence he might have had such knowledge. The annotator in 34 L. R. A. n. s. 798, *supra,* points out that this doctrine goes further than other adjudicated cases, that it is not based upon precedent, and has never been followed by the courts of other jurisdictions; but, on the other hand, the doctrine therein asserted has been considered by the courts and expressly disapproved. In *Shinkle, Wilson & Kreis Co. v. Birney & Seymour,* 68 Ohio St. 328, in a discussion of this holding, the court said: "It is not reconcilable with the principles of the law, nor with the decided cases which are entitled to be recognized as authoritative."

The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud on the part of the lessor, the lessee cannot recover for personal injuries received through latent defects therein, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor.

When this rule is applied, there is a total lack of evidence to sustain the verdict. Paragraphs 3 and 4 of our former opinion overruled, and the judgment of the district court is reversed and the cause remanded.

REVERSED.

HAMER, J., not sitting.

SEDGWICK, J., dissenting.

The question upon which the decision in this case depends I think is rather a question of fact than of law; and the third paragraph of our former opinion ought not to be overruled. In England, by statute, a rented house must be in all respects reasonably fit for human habitation, and it was there held that a landlord is liable in case the premises are not reasonably fit for habitation so that the plaster on the ceiling falls and injures the tenant. But in this country the courts have generally applied the rule of *caveat emptor* between landlord and tenant about the same as the rule is applied between vendor and purchaser. That rule is that the landlord is not liable for "latent" defects which the tenant has equal opportunity to observe. "It is not his duty to search for defects, and if the defect is easily discoverable he need not mention it." But "if he knows of a defect which is likely to produce injury, the nature of which is such that careful examination by the tenant would not disclose it, he must notify the tenant of it." Note to *Hines v. Willcox,* 96 Tenn. 148, in 34 L. R. A. 824, 827. This seems to be the universal rule, as it is between vendor and purchaser. When can it be said that the landlord *knows* of defects? Does this mean that he must have personally seen and examined the defect? I think that the majority opinion goes so far as to so hold. If some one else had seen and examined the defect and had suggested it to the landlord, the landlord could not have been said to *know* of it, as defined in the majority opinion. This, of course, is not the meaning of the expression in the authorities cited. The Massachusetts court has gone as far perhaps as any court in this country in relieving the landlord from liability for unknown and hidden defects that would require investigation to ascertain them, but that court in a recent decision has decided: "If there is a concealed defect that renders the premises dangerous, which the tenant cannot discover by the exercise of reasonable diligence, of which the landlord has or *ought to have* knowledge, it is the landlord's duty to disclose it, and

he is liable for an injury which results from his concealment of it." *Booth v. Merriam,* 155 Mass. 521. The expression "or ought to have knowledge" is a stronger expression than the one in the third paragraph of the syllabus of our original opinion in this case. The words there used are: "Or ought to know from facts within his knowledge that it is dangerous." This I think is clearly the law. If the landlord *knows facts* which would necessarily cause the defect, he, within the meaning of all the cases, must be held to know the defect; so that it is a correct statement of the law to say that, as in the third paragraph of the syllabus of the former opinion, if he "knows at the time, or ought to know from the facts within his knowledge," that it is dangerous, then he must warn the tenant, if "the conditions are such that an ordinarily prudent person, situated as the tenant was, would not know the danger." I think, therefore, the third paragraph of the syllabus of the former opinion ought not to be overruled.

The question, then, is a question of fact. The evidence shows that certain facts were within the knowledge of the landlord. Were these facts such as would lead reasonable men to the conclusion that the floor was dangerous? If they were, then the next question is: Was the tenant so situated that she would not know these facts from which any reasonable person would conclude that the floor was dangerous? Those two questions are the vital questions in this case, and are questions of fact, and not of law. We should probably follow the rule of *caveat emptor,* which is so well established in this country. It has been a little difficult to apply this rule with exact justice in some cases, and some of the opinions seem a little extravagant in protecting reckless landlords. The rule should not be strained in favor of shrewd landlords, who are familiar with the construction of buildings and the general condition of the same, against an elderly lady who has no such knowledge and experience, and who must necessarily rely upon the good faith of the landlord. This case is a difficult one

at best, and it would seem that the evidence is such as to require these questions of fact to be submitted to a jury.

FAWCETT, J., concurs in the above dissent.

JOSEPH L. MILLER, APPELLEE, V. WILLIAM MUNCE; H. H. VANDEVENTER, INTERVENER, APPELLANT.

FILED OCTOBER 2, 1915. No. 18187.

Justice of the Peace: APPEAL: JURISDICTION: PROCEDURE. Section 4809, Ann. St. 1911, gave the defeated party the right to either appeal or prosecute error from a judgment of the county court; and when no trial was had, and the court had merely construed the pleadings, or some of them, no motion for a new trial was necessary in order to give the district court jurisdiction on appeal.

APPEAL from the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Reversed.*

Morrow & Morrow, for appellant.

Beach Coleman, contra.

MORRISSEY, C. J.

Appellee brought this action in the county court of Scott's Bluff county against William Munce to recover a balance due for merchandise sold and delivered to Munce, and summoned as garnishee the Scottsbluff Sugar Company. The sugar company admitted having received a shipment of beets from the defendant, and that it had to his credit $502. This money was paid into the county court. H. H. Vandeventer filed a petition in intervention, claiming that he was the owner of the land on which these beets were raised; that he leased the land to the defendant Munce for a crop rental, the intervener to receive three-fourths of all the crops raised and Munce one-fourth; that the debt owing by the sugar company is the proceeds of the beets so raised on the intervener's land; and alleged that the defendant Munce had received more than his share

of the crop; and asked that judgment be entered in his favor for the entire amount in the hands of the sugar company. Defendant Munce made no appearance. Plaintiff demurred to the petition of intervention. The county court sustained the demurrer, dismissed the petition, and entered judgment by default against the defendant Munce. The intervener filed an undertaking conditioned for the payment of the judgment and costs if judgment should be entered against him, and appealed the cause to the district court. Plaintiff's demurrer to the petition of intervention was overruled by the district court. Subsequently plaintiff filed a motion to dismiss the appeal of intervener, alleging that the district court could acquire no jurisdiction of the subject matter on appeal; that it had no jurisdiction of the subject matter sought to be subjected to the claims of the intervener; that the intervener had filed no petition in error in the district court, and had filed no motion for new trial in the county court. The court entered an order sustaining the motion, and directing that the appeal be "quashed, for the reason that this court can acquire no jurisdiction of this cause by appeal, and for the reason that intervener has filed no petition in error in this cause." The intervener took an exception, and has brought the cause here for review.

Section 4809, Ann. St. 1911, in force at the time, provided: "In civil actions brought under the provisions of this chapter either party may appeal from the judgment of the probate court, or prosecute a petition in error, in the same manner as provided by law in cases tried and determined by justices of the peace." This is so plain that it cannot be questioned that the statute provides for appeals from the county to the district court. Perhaps the intervener might have prosecuted error proceedings, but by appeal he removed the whole cause to the district court, as the statute gave him the right to do.

It is insisted by appellee that the district court was without jurisdiction to hear the cause on appeal because no motion for new trial was made in the county court. That question was decided adversely to the contention of

appellee in *O'Donohue v. Hendrix*, 13 Neb. 255, where the court said: "A motion for a new trial is necessary only in those cases where a trial has been had. If the court has merely construed the pleadings, or some of them, as in sustaining or overruling a demurrer to a petition, answer or reply, no motion for a new trial is necessary."

It is also contended by appellee that intervener had no remedy except to proceed under section 8441, Rev. St. 1913; but that question was settled in *Farrington v. Fleming Commission Co.*, 94 Neb. 108, where the court said: "When a garnishee answers that he has money in his hands belonging to the judgment debtor, it is proper to allow one who claims the money, and is not a party to the proceedings, to appear and contest the right of the plaintiff to apply the money on his claim."

The correctness of the ruling of the county court is not before us. The district court has already overruled the demurrer, and no appeal has been taken from that order. It therefore follows that the only question before the court is the order made quashing intervener's appeal and dismissing the petition. This order is reversed and the cause remanded for further proceedings.

REVERSED.

HAMER, J., not sitting.

SEDGWICK, J., concurring.

I think that the conclusion of the majority opinion is right, but it seems to me that the opinion is indefinite and unsatisfactory.

What should the district court have tried, and what questions will it try now, if this cause is remanded? Is the judgment of the plaintiff against Munce vacated? Will that issue have to be tried again? Is the liability of the sugar company open for investigation by this appeal? Can an appeal be taken from a judgment of the county court in any case without first filing a motion for a new trial and getting a ruling thereon? The syllabus and opinion imply that, with the exception named, a motion for new trial is necessary and no appeal can be taken without

such motion. *O'Donohue v. Hendrix*, 13 Neb. 255, is quoted from: "A motion for a new trial is necessary only in those cases where a trial has been had." This, of course, amounts to saying that when a trial has been had a motion for new trial is necessary. That is the rule in the district court, as there held. This opinion appears to apply it to cases in the county court.

I understand that it has not been the practice to file motions for new trial in the county courts before appealing, and this opinion will by implication, and without reasoning or discussion, call for an entire change of practice in those courts upon appeal. I think that, if that is the correct construction of the statutes, the practice should be made plain and the reasons given for such a holding.

In the district court, which is a court of general equity jurisdiction, a party can intervene even in garnishment proceedings and have his equitable interest in the property established. This was so decided in *Farrington v. Fleming Commission Co.*, 94 Neb. 108. That case is cited as applying to the county court, which has no general equity jurisdiction.

So far as the rights of Munce and Vandeventer depended upon the equities between them, could the county court allow Vandeventer to become a party for the purpose of trying those equities? The sugar company was rash in its willingness to pay the money into court. Unless the plaintiff in the case could show that the defendant had a clear legal right to the money in the hands of the garnishee, the court would be without authority to order the money paid into court and apply it on the plaintiff's claim, and, when Vandeventer filed his objections, prudence would have dictated to the sugar company to have insisted upon those objections, because, if the company failed to do so, Vandeventer's right to the money, as against the company, would not be determined by the action and the company would be still liable to Vandeventer. That is the way the thing ordinarily proceeds in garnishment. If some third party claims the money, the court will not order it paid upon the judgment against the

defendant until the rights of the parties claiming the money are determined. In the district court they could be determined by filing a petition equitable in its nature, if the rights of the parties depended upon the equities between them, but whether that could be done in the county court I think this court has never determined. For instance, if one of two partners was garnished, and it appeared that the partnership was not indebted to the principal defendant, and the equities between the partners had not been settled, it would require a court of equity to determine whether the garnishee should pay money into court.

It is said in the opinion: "The correctness of the ruling of the county court is not before us." The county court sustained the demurrer to Vandeventer's objection and dismissed the intervener. The district court first made an order reversing the county court and overruling the demurrer, and afterwards (it does not appear from the opinion whether it was at the same or at a subsequent term of court) that court dismissed the appeal. If it was at a subsequent term of the district court, would the court have jurisdiction to dismiss the appeal? If it was at the same term, it would vacate the ruling upon the demurrer filed in the county court. If the judgment of the district court is reversed, the judgment of the county court should be reversed also, and that court should allow the garnishee to answer that the money in his hands belongs to parties other than the principal defendant.

WESTERN REFERENCE & BOND ASSOCIATION ET AL., APPELLANTS, V. JOHN H. MOREHEAD, COMMISSIONER OF LABOR, ET AL., APPELLEES.

FILED OCTOBER 2, 1915. No. 19179.

Injunction will not lie to prevent the enforcement of an alleged void statute, where it is not affirmatively shown that the plaintiff has not an adequate remedy at law.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

H. H. Bowes and *John G. Kuhn,* for appellants.

Willis E. Reed, Attorney General, and *George W. Ayres, contra.*

MORRISSEY, C. J.

This action is submitted under rule 14 (94 Neb. XIII) as a case stated, and is brought to restrain the commissioner of labor and his deputy from enforcing the provisions of House Roll 144 (Laws 1915, ch. 209) passed and approved April 16, 1915. Plaintiffs allege that some of them come wholly within the provisions of the act, and others come partially within its provisions, and that the commissioner of labor and his deputy will enforce the provisions of the act, unless restrained from so doing. It is further pointed out that the act violates several provisions of the Constitution, and is therefore void. The attorney general filed a general demurrer to the petition, which was sustained by the court, and plaintiffs have appealed.

The act is intended to provide for the regulation of employment bureaus. It forbids the operation or maintenance of an employment agency or bureau for hire without having first procured a license from the state, and exacts a license fee of $60 per annum from such agencies, except teachers' agencies, where the fee is fixed at $10 per annum. It lays certain restrictions as to where the agency office shall be located, requires the giving of a surety bond conditioned for the performance of the requirements of the act, empowers the deputy commissioner of labor to administer oaths, subpœna witnesses, take depositions, *et cetera,* confers upon the commissioner of labor, or his deputy, the power to conduct investigations into the method or manner of conducting the business, and, in his discretion, to cancel any license held. It requires every licensed agency to keep a register, in which shall be entered the name and sex of every person for whom employment is secured and the amount of the fee charged,

and the name and address of every person for whom help or servants are secured. It provides that this register shall be open to inspection and examination by the deputy commissioner of labor or his agents, and that a copy thereof be filed with the deputy commissioner of labor once a month. It requires the agency to issue a receipt to every person securing employment or help, showing the occupation, name and address of the applicant, and the amount of fee charged for procuring the position, and also showing the wage to be paid, with the name and address of the employer, together with the name of the agency issuing such receipt, also the nature of the employment offered, and, if a strike or lockout is known to exist, the fact shall be stated. It is provided that this receipt shall be issued on forms prescribed by the commissioner of labor, and that a carbon copy thereof shall be mailed to the deputy commissioner. It also forbids any licensed agency from charging a registration fee, provides that the receipt, heretofore mentioned, shall show the amount of the fee or commission charged for the services rendered, and that, in case the party paying such fee fails to obtain the employment specified, and such failure is not by the fault of such applicant, the fee shall be repaid upon demand, and that, in cases where the person seeking employment is sent beyond the limits of the city in which the employment agency operates, the agency shall repay, in addition to the commission received, any actual expense incurred by reason of failure to receive employment, when it appears that the employment agency made false representations. It forbids, under a penalty of not less than $50, or imprisonment in the county jail for a period not to exceed three months, the division of fees between the manager of any such agency and any person, company or corporation for whom employees are furnished. It forbids the sending of any female help to any place of bad repute, *et cetera*, the publishing of any false information, or the making of any false promises relating to work or employment, or the making of any false entry in the register of such agency. It is made the duty of the deputy commissioner of

labor to enforce the act, and he is authorized to institute criminal proceedings for the enforcement of its penalties.

Section 12 provides: "Every person, company, corporation or association doing business in this state, who shall have persons brought into this state for the purpose of employment through or by means of any employment agency operating in another state, shall fulfil the terms of the contract made between such persons shipped in for the purpose of employment and the employment agency, or shall within a reasonable period of time after the arrival of such persons desiring employment provide such persons with transportation to their original starting point and such meals and lodging as may be necessary for the proper subsistence of such persons until they arrive at their destination. Failure to comply with this section shall subject the offending parties to a fine of not less than fifty dollars ($50) nor more than one hundred dollars ($100) for each offense."

The act (section 15) further provides: "Any person, firm or corporation who for hire or with a view to profit shall undertake to secure employment or help or through the medium of cards, circulars, pamphlets of any nature whatsoever, or through the display of a sign or bulletin offer to secure employment or help or give information as to where employment or help shall be secured, shall be deemed a private employment agency and shall be subject to the provisions of this act."

The attorney general points out in his brief that, even though the act be void, the appellants have an adequate remedy at law, and that injunction will not lie. The demurrer admitted all allegations of fact that were well pleaded in the petition. The petition is not before us, but the stipulation contained in the case stated limits the allegations thereof to the mere assertion that the officers named in the act are about to enforce its provisions, and that certain of the plaintiffs come wholly, and others come partially, within its terms, and, if the act is enforced, will be liable for the license therein provided, or, in case of its violation, be liable for the penalties prescribed. There

are also allegations as to their methods of doing business, but it is neither alleged nor shown that they will suffer in their property rights, unless we are to assume that the mere enforcement of the act will work such injury.

It is said in *In re Sawyer,* 124 U. S. 200, that the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It is, however, pointed out that the rule has its exceptions, such as when a threatened prosecution is hostile, vexatious, and unwarranted, and involves the wanton destruction of or injury to property interests of the accused, and especially so where the injured party would have no adequate remedy at law. The rule seems to be that a court of equity will not interfere with the enforcement of a statute, except where property rights are involved and the petitioner has no adequate remedy at law. If the act is valid, plaintiffs cannot complain of its enforcement. If invalid, that defense may be asserted in the court where a prosecution is attempted. The validity or invalidity of the act is purely a question of law, and it will not be assumed that a court of law will incorrectly decide it. *City of Denver v. Beede,* 25 Colo. 172.

Appellants rely upon the cases of *Iams v. Mellor,* 93 Neb. 438, and *Bartels Northern Oil Co. v. Jackman,* 29 N. Dak. 236. In the former case this court upheld the action of the district court in restraining the enforcement of, and declaring void, what was known as the "Stallion Registration Law." In that case the jurisdiction of the equity court was not called in question, while the issue of fact was made that the defendants had interfered with the sale of plaintiff's property, that its market value had been reduced and depreciated, and, unless restrained, they would continue this interference.

Neither is *Bartels Northern Oil Co. v. Jackman, supra,* a parallel case. There the state of North Dakota had passed an oil inspection law levying an inspection fee largely in excess of the amount necessary for the payment of the expense of inspection. Plaintiff was a large dealer

in oils, and, from day to day, placed in its storage tanks, at its several places of business within the state, large quantities of oils for the use of its customers. It was alleged that the defendant inspector had seized these oils and threatened to hold the same until the inspection fees were paid. Here the property was directly affected and the equity court acquired jurisdiction.

The record does not disclose facts sufficient to confer jurisdiction on a court of equity, and it is therefore unnecessary to pass upon the other questions raised.

The judgment of dismissal is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

HAMER, J., not sitting.

E. B. ATKINSON, APPELLANT, V. H. M. UTTLEY, APPELLEE.

FILED OCTOBER 2, 1915. No. 18161.

1. **Judgment: REVIVOR: LIMITATIONS.** The act of 1909 (Laws 1909, ch. 154, Rev. St. 1913, sec. 8041), relating to revivor of dormant judgments, applies to all judgments rendered before as well as those rendered after its passage.
2. **———: ———: VALIDITY OF STATUTE.** The time between the passage of the act and the date when it took effect will be considered by the courts in passing upon the question as to whether reasonable time was given thereby to judgment creditors in which to assert their rights.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

W. A. Meserve, for appellant.

M. F. Harrington, contra.

BARNES, J.

This is an appeal from a proceeding in the district court for Holt county to revive a judgment. The record dis-

closes that on April 3, 1894, the appellant obtained a judgment in the county court of Holt county against H. M. Uttley, the appellee, for the sum of $1,000, and costs of suit taxed at $3.30. No execution was ever issued by that court, and on the 12th day of April, 1894, the judgment was transcribed to the district court of that county. No part of the judgment was ever paid, and no execution has ever been issued by the district court to collect the same. On October 30, 1909, the appellant commenced this proceeding by petition to the district court to revive the judgment. To that petition the defendant answered, admitting that the judgment had been obtained and had become dormant, and alleged that no execution was ever issued on said judgment; that the judgment had been dormant for more than ten years from and after the 4th day of April, 1899, and that no proceeding had ever been had to revive the same until the commencement of the present action. On the hearing the court found for the defendant and dismissed plaintiff's petition, and he has perfected an appeal to this court to obtain a reversal of that judgment.

Appellant contends that section 8041, Rev. St. 1913, does not, by its terms, apply to judgments which were dormant at the time it was adopted; therefore the district court erred in refusing to revive the judgment and dismissing plaintiff's petition. The provision is general that no judgment shall be revived unless the action to revive the same shall be commenced within ten years after such judgment becomes dormant. The judgment in question became dormant from and after the 4th day of April, 1899, and plaintiff's petition was filed on the 30th day of October, 1909. It thus appears that the judgment had been dormant for more than ten years when this proceeding was commenced. The section in question is general in its terms, and was no doubt intended to apply to all judgments, whether rendered before or after that section was adopted.

It is next contended that, if it does apply to the judgment sought to be revived, then it is void because it contains no saving clause as to such judgments, and that, in order to uphold the section, it must be applied so as to

give the creditor a reasonable opportunity to bring an action to revive his judgment. It is argued that, appellant having brought his action some four months after the law took effect, it was brought within a reasonable time. Several authorities are cited in support of this contention.

It appears, however, that the supreme court of North Dakota, in *Osborne v. Lindstrom,* 9 N. Dak. 1, determined a somewhat similar question. It was there held: "But the power of the courts is limited to passing upon the acts of the legislature, and, if the legislature has failed to act, courts cannot supply the lapse. Fixing the time within which to bring action is purely a legislative function. * * * The time between the date of the passage of an act and the date at which it takes effect will be considered by the courts in passing upon the question as to whether reasonable time had been given in which to bring suit. In such cases, the courts hold that, in postponing the date at which the law should take effect, the courts intended that the intervening time should be given in which to assert rights." See, also, *Guiterman v. Wishon,* 21 Mont. 458.

The section in question in this case was adopted by the legislature of 1909, and did not take effect until three calendar months after its adoption. There can be no doubt but that the legislature considered that this was a sufficient time in which any judgment creditor whose judgment had become dormant might commence an action to revive the same. The appellant in this case had the three calendar months above mentioned, and, in addition thereto, took four months further time before he commenced this action. Therefore he cannot consistently say that, as applied to him, the section in question is unconstitutional and void. This view is also in a manner supported by the supreme court of Kansas, in *Angell v. Martin,* 24 Kan. 334, and *Burnes v. Simpson,* 9 Kan. 658. *Armstrong v. Patterson,* 97 Neb. 871, and *Holmes v. Webster, ante,* p. 105, while not exactly in point, throw some light on the question of actions brought on judgments.

The judgment in question in this case having been rendered more than 15 years before this proceeding was commenced, and no execution ever having been issued, and no attempt made to collect the judgment, we are of opinion that the plaintiff should not now be allowed to revive the same or further harass the defendant in attempting to collect the same.

The judgment of the district court is therefore

AFFIRMED.

HAMER, J., not sitting.

P. A. WELLS, EXECUTOR, APPELLANT, V. HERMAN E. COCHRAN, APPELLEE.

FILED OCTOBER 2, 1915. No. 19056.

1. **Appeal: REVERSAL: LAW OF THE CASE.** Where a judgment of the district court is reversed and the cause is remanded for a new trial, on such new trial the court is bound by the law of the case as announced by the supreme court.
2. **Principal and Agent: CONTRACT WITH PRINCIPAL.** An agent, who makes a contract with his principal in regard to the subject matter of his agency, must disclose to his principal all of the facts within his knowledge affecting the value of the things so contracted for. If he fails to do so, the principal will not be bound by the contract so made.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Ray J. Abbott and *P. A. Wells,* for appellant.

A. S. Churchill, contra.

BARNES, J.

This case is before us a third time. Our former opinions are reported in 78 Neb. 612, and 84 Neb. 278. In our last opinion it was held: "All profits made or advantage gained by an agent in the execution of his agency belong *prima facie* to his principal." It was further held: "An

agent cannot, directly or indirectly, lawfully have an interest in the sale of the property of his principal without the latter's consent freely given after full knowledge of all facts known to the former; and, if a contract is made in regard thereto after said agency is created, the burden of proof is on the agent to show the knowledge and consent of his principal." These statements have become the law of the case.

The issues remain the same as they were when the cause was tried the second time. On the present trial, the defendant had the verdict and judgment, and the plaintiff has again brought the case to this court for reversal. It will not be necessary to set forth the pleadings in full, for the issues are fairly stated in our former opinions.

It appears that the trial court, by his instructions, informed the jury that the only question which they could consider was whether the plaintiff's testate signed the contract, by which it was claimed Johnson agreed that defendant should have all he could get from the Hawvers in exchange for his Frontier county land in excess of the South Omaha lot. This is assigned as error. If Johnson, after he had employed Cochran, as claimed in the plaintiff's petition, signed the agreement which defendant contended authorized him to retain the $500 paid him by Hawver, without any knowledge of the fact that defendant had received or been promised this boot money, and defendant fraudulently concealed that fact from his client, then, as the agent and attorney of Johnson, he was bound to make such disclosure, and the contract, if signed by Johnson, was of no binding force and effect. It is a well-settled rule of law that fraud will vitiate such contracts. Our opinion on the last appeal shows clearly that the issue should not have been so restricted, and the giving of the instructions complained of, and the refusal to submit the question of fraudulent concealment, as requested by the plaintiff, was reversible error.

It is unnecessary to determine the other errors assigned, except that the evidence which tended to show the fraud and deceit should have been submitted to the jury, and

they should have been required to determine its truth or falsity.

The judgment of the district court is therefore reversed and the cause is remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

PERRY L. FULLER, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 2, 1915. No. 18184.

CARRIERS: TRANSPORTATION OF LIVE STOCK: ACTION FOR INJURIES: INSTRUCTIONS. Where a joint action was brought against an initial and a connecting carrier for injuries to animals transported over both roads and a judgment was rendered exonerating the connecting carrier, from which judgment no appeal was taken, it was erroneous to instruct the jury, on appeal to the district court by the initial carrier from the judgment against it, that they might consider and assess damages for injuries occurring on the line of the connecting carrier.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Reversed.*

A. A. McLaughlin, Edgar R. Hart and *Wymer Dressler,* for appellant.

W. A. Prince, contra.

LETTON, J.

Plaintiff delivered 54 head of horses and mules at Ewing, Nebraska, to the defendant to be transported to Grand Island, Nebraska. Plaintiff charges that, while the horses were being loaded, the loading chute broke and several of the horses were injured. The animals were loaded in two cars, one of which cars is charged to have been defective, which were taken to Norfolk by the defendant, and from there were transported to Grand Island by the Union Pacific Railroad Company. When the horses ar-

rived at Grand Island, several of them were found to be injured, as plaintiff claims to his damage in the sum of $145, for which amount verdict and judgment were rendered against the defendant. Defendant appeals.

It appears that the action was originally commenced in the county court of Hall county against the Chicago & Northwestern Railway Company and the Union Pacific Railroad Company as joint defendants. The trial there resulted in a verdict in favor of plaintiff against the Chicago & Northwestern Railway Company, and against the plaintiff in favor of the Union Pacific Railroad Company. The Chicago & Northwestern Railway Company alone appealed. The plaintiff filed his petition in the district court against the latter company alone. In its answer defendant admitted that it received the horses, denied that the loading chute or either of the cars were out of repair, alleged that the plaintiff entered into a written contract whereby it was agreed that the defendant should not be liable for any injuries in carrying the animals except upon its own line, and that it safely conveyed the horses to Norfolk and delivered the animals to the Union Pacific Railroad Company, in good condition according to contract. It was further alleged that, on account of the judgment mentioned, plaintiff is estopped to claim any liability against this defendant for any damage or injury occurring while in the hands of the Union Pacific Railroad Company.

Plaintiff insists that the contract was one for a through shipment from Ewing to Grand Island, while the defendant takes the position that by the contract defendant only undertook to transport the animals safely to Norfolk and there deliver them to the connecting carrier to be transported to Grand Island. Defendant insists that under the holding in *Fremont, E. & M. V. R. Co. v. Waters*, 50 Neb. 592, *Fremont E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159, and *Whitnack v. Chicago, B. & Q. R. Co.*, 82 Neb. 464, the defendant is not liable for injuries not occurring upon its own line of road. Contracts similar to the one in question were held to provide for a

through shipment in the cases of *Chicago, R. I. & P. R. Co. v. Western Hay & Grain Co.*, 2 Neb. (Unof.) 784, and *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463. Section 6058, Rev. St. 1913, provides in part: "Whenever two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight, to the consignee of the freight, in the same order in which such freight was shipped." No reference seems to have been made to this statute in such former opinions.

Under the peculiar circumstances of this case, we think it is unnecessary to consider this question critically. The action was originally a joint action against both carriers. The issue as to whether the injuries occurred upon the line of the Union Pacific Railroad Company or the Chicago & Northwestern Railway Company was tried and determined in the county court. No appeal was taken from this judgment. The plaintiff is bound by it, and cannot now assert in the same action that the Chicago & Northwestern Railway Company is liable for injuries which may have occurred on the line of the Union Pacific Railroad Company. Plaintiff was not obliged to join both carriers; but, having elected to try that issue, he is bound by its adjudication.

We think that the trial court erred in refusing to instruct the jury at the request of defendant that the defendant was not liable for injuries which the animals may have received while being transported by the Union Pacific Railroad Company, and in instructing on the theory that it was immaterial on which line the injuries occurred. The defendant is liable for any damages which may have resulted prior to the delivery of the animals to the Union Pacific Railroad Company.

It is impossible to determine how far the testimony as to the loading chute and cars affected the verdict. It will therefore be necessary for a retrial of the case with the issues confined to the injuries suffered before the Union

Pacific Railroad Company assumed control of the shipment.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

HENRY GOTCHALL, APPELLEE, V. GEORGE GOTCHALL, APPELLANT; GEORGE A. ADAMS ET AL., APPELLEES.

FILED OCTOBER 2, 1915. No. 18267.

1. **Wills: SUIT TO ENFORCE: JURISDICTION.** An action by a legatee to quiet the title of the administrator with the will annexed to certain real estate of the testator for the purpose of sale, to declare a trust and that the administrator is a trustee, to define his duties, to determine the question whether an outstanding life estate exists in the principal defendant, and to recover possession of the land for the trustee, is not within the jurisdiction of the county court, and is within the jurisdiction of the district court, sitting as a court of equity.

2. ———: **DEVISE: CONSTRUCTION.** Whether a devise is upon a condition precedent or subsequent is not to be determined alone from the use of technical words in a will. The question is one of the intention of the testator. If the language of the whole will shows that it was the intention of the testator that the act upon which the right depends was to be performed before the interest vested, the condition is precedent, and in such case, unless the act is performed as directed and required by the will, no interest in the property passes.

3. ———: ———: ———: **CONDITION PRECEDENT.** Will construed, and *held* that the payment of the mortgage upon the land was a condition precedent to the right of the appellant to the use and occupation of the premises.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Aldrich & Fuller, for appellant.

George A. Adams and *George W. Berge, contra.*

LETTON, J.

This action is brought by Henry Gotchall, one of the children of John Gotchall, deceased, making George A. Adams, administrator with the will annexed, and all the other legatees of the deceased parties. The purpose of the action is to declare that the defendants, George Gotchall and his wife, have no interest in certain real estate disposed of by the will, to quiet the title of the administrator and trustee therein, and for directions to him to convert the real estate into money and to proceed with the administration of the estate. The administrator and trustee concur in asking the same relief. The executor named in the will declined to act, and an administrator with the will annexed was appointed. The claims against the estate existing prior to the death of John Gotchall have been paid, but claims for the support of the widow are still unsettled. The provisions of the will which are involved are as follows:

"(2) I will and bequeath that if my farm is not sold during my lifetime, that my beloved wife, Anna Gotchall, have her support off of said farm so long as she may live.

"(3) There being a twenty-one hundred ($2,100) dollar mortgage now upon my farm, I will and bequeath that if I own said farm at my death, that my two beloved sons, Henry Gotchall and George Gotchall, have the use of said farm, subject to the support of my beloved wife, so long as they may desire to use the same, provided they pay off said mortgage now upon the same, and keep the same free from debts, and keep the taxes paid upon it, and keep the same in fair repair, until such time as they may deem that they have held the same long enough to pay them for the payment of said mortgage, and the interest upon the money used in paying the same, and that in equity and good conscience they have been fully paid, and that said property should be divided among my said children, at which time it shall be disposed of as hereinafter stated.

"(4) I will and bequeath to my beloved son, William Gotchall, the sum of five ($5.00) dollars, to my beloved son, Arthur Gotchall, the sum of five ($5.00) dollars, and

to my beloved son, Curtis Gotchall, the sum of five ($5.00) dollars, they and each of them having received from me heretofore one thousand ($1,000) dollars.

"(5) Should I sell said land before my death, I then will and bequeath that my beloved wife shall be supported from the proceeds of the same, or of what shall remain of the same at my death, so long as she may live, and that at her death, the remaining portion of the same be divided, among my children as follows: Mary Julick, wife of Merari Julick, Sabina Ramsey, wife of John Ramsey, Henry Gotchall, George Gotchall, and Emily Vantress, one thousand ($1,000) dollars each, and the remainder, if any, to be equally divided among all my children."

"(7) I will and bequeath that whatever of the personal property, if any, shall be remaining after the payment of my funeral expenses and expenses of my last sickness and expenses of administration, shall go to and be the absolute property of my beloved son, George Gotchall, giving to him the right, if he so desire, to distribute the same among his brothers and sisters.

"(8) That at such time as my beloved sons, Henry and George Gotchall, deem that they have been sufficiently paid by the use of said farm for the satisfaction of said mortgage, the said land shall be sold and out of the proceeds one thousand ($1,000) dollars be paid to each of my beloved children, as follows: Mary Julick, Sabina Ramsey, Henry Gotchall, George Gotchall, and Emily Vantress, and the remainder, if any, to be held by my son, George Gotchall, until he shall see fit to divide it among my children, Mary Julick, Sabina Ramsey, Henry Gotchall, George Gotchall and Emily Vantress."

The $2,100 mortgage was never paid. John and Henry Gotchall took possession of the farm and continued to reside thereon with the widow for some time. After George married, dissensions arose, and early in 1909 Henry Gotchall and his mother left the farm, and Mrs. Gotchall never lived there afterward. She died in July, 1911. George has retained and is now in possession of the real estate.

The defendant George Gotchall contends that the will created a life estate in John and Henry Gotchall, subject to the lien of the mortgage and a lien for the support of the widow. He prays that the court construe the will to that effect, and that it decree that Henry has forfeited all his right to the land by reason of his failure to comply with the conditions of the will, and that George, therefore, is entitled to a life estate in the entire premises.

The district court found that, under the provisions of the will, no life estate was created in either George or Henry Gotchall. The title to the real estate was quieted in the administrator and trustee for the purpose of sale. He was given possession of the land, and directed to sell it and proceed with the administration of the estate in accordance with the will. George Gotchall was enjoined from asserting any right, title or interest in the premises inconsistent with the rights of the administrator.

Appellant contends that the district court has no jurisdiction, the action being within the sole original jurisdiction of the county court. We are of a contrary view. The construction of the will is only incidental to the real purpose of the action, which was to declare a trust in the administrator, to determine the extent of the duties of the trustee, to settle the question as to whether a life estate in the land existed in George Gotchall, and to recover possession for the trustee. Under section 16, art. VI of the Constitution, the county court has no jurisdiction to determine such issues. Cases illustrating the distinction between actions brought merely to construe a will and such actions as this are *Andersen v. Andersen,* 69 Neb. 565, *Adams v. Dennis,* 76 Neb. 682, and *Fisher v. Fisher,* 80 Neb. 145.

The proper function of a court in construing a will is to ascertain the intention of the testator and to uphold his wishes, if not forbidden by some positive rule of law. The appellant states the question thus: "First, under the terms of the will, did testator intend and provide that George Gotchall and Henry Gotchall should do certain things before they could take possession of the place, that

is, provide for the mother, pay off the mortgage and other things? second, or did he intend and provide that for doing the things just mentioned they should have the use and occupation of the farm? If the former, it is a condition precedent; if the latter, it is a condition subsequent." This is hardly a correct statement of the question, since the support of the widow was a charge upon the land in any event. But it is correct so far as the payment of the mortgage is concerned.

In *Finlay v. King*, 3 Pet. (U. S.) *346, it is said: "It is certainly well settled that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent; the same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act upon which the estate depends must be performed before the estate can vest, the condition, of course, is precedent; and, unless it be performed, the devisee can take nothing. If, on the contrary, the act do not necessarily precede the vesting of the estate, but may accompany or follow it, and this is to be collected from the whole will, the condition is subsequent."

Tested by this standard and considering the whole instrument it is apparent that the first thought of the testator was to provide for the support of his widow, the next to provide for the payment of the mortgage, the sale of the land free of the lien, the payment of $1,000 each to those of his children to whom an advancement of that amount had not been made, and the equal distribution of the remainder among all the children. It is clear that the payment of the mortgage of $2,100 was a condition precedent to Henry and George having the use of the farm, and that as a reward and recompense for so doing, and for supporting their mother, they should have the use of the farm "until such time as they may deem that they have held the same long enough to pay them for the payment of said mortgage, and the interest upon the money used in paying the same, and that in equity and good con-

science they have been fully paid." The language of the will which provides that the sons shall have the occupation of the farm "long enough to pay them for the payment of said mortgage" clearly so implies. This construction is reinforced by the language in the eighth paragraph. *Fisher v. Fisher, supra.*

It is argued that a court of equity will not enforce a forfeiture for nonperformance of a condition subsequent; but, having construed this provision to be a condition precedent, the authorities cited do not apply.

The directions as to the sale of the property operated to convert the real estate into personalty. *Chick v. Ives*, 2 Neb. (Unof.) 879. The time of conversion was subject to being postponed to the repayment of George and Henry, if they first paid the mortgage; but, since this they failed to do, the right to the proceeds vested in the respective legatees after a reasonable time had elapsed in which the brothers might have met the condition precedent on which their right to hold the possession of the land depended. It then became the duty of the administrator to sell the real estate and pay the legacies.

We think the district court made the proper construction of the will and disposition of the case. Its judgment is therefore

AFFIRMED.

HAMER, J., not sitting.

MINNEAPOLIS BREWING COMPANY, APPELLEE, V. THOMAS J. FLYNN, CITY CLERK, ET AL., APPELLANTS.

FILED OCTOBER 2, 1915. No. 19229.

1. **Intoxicating Liquors: GRANT OF LICENSE: DISCRETION OF BOARD: REVIEW.** The issuance of a license to sell intoxicating liquors is committed by the statute to the discretion of the several excise boards and city and village councils. The power of the courts to review their decisions extends to determining whether the jurisdictional facts necessary to the granting of the license have been shown to exist, and, in some cases, to determine whether their action in

refusing a license has been so arbitrary and unjust as to constitute an abuse of discretion.

2. ———: ———: ———: PRESUMPTION: BURDEN OF PROOF. In the absence of evidence to the contrary, it will be presumed that an excise board has exercised a legal discretion in determining the number of liquor licenses to be issued, and in refusing to grant a license in excess of the number fixed. The burden of proof is upon one who asserts that there has been an abuse of discretion.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed with directions.*

John A. Rine, W. C. Lambert, H. B. Fleharty and *L. J. Te Poel,* for appellants.

Benjamin S. Baker and *F. A. Mulfinger, contra.*

LETTON, J.

In May, 1915, the appellee made application to the city council of Omaha, sitting as an excise board, for a wholesale license to sell liquors in that city. The application was refused. An appeal was taken to the district court, where the order of the excise board was reversed, upon the ground that the action of the city council denying the license was arbitrary and an abuse of the discretion vested in it by law. The case is here upon appeal from that order.

The city council, in denying the applicant a license, recited the passage of a resolution on the 31st day of December, 1914, declaring that it was for the best interests of the public that no additional wholesale licenses to sell malt, spirituous and vinous liquors in the city of Omaha, over and above the number on said date granted, should be granted by the city council, declared that it "now believes that the best interests of the public and of the city still demand that no other wholesale liquor license to sell liquor at wholesale within the city for the year 1915 be granted," and it therefore refused the license.

The appellants insist that the question as to the number of liquor licenses to be issued rested in the discretion of the excise board, and that no abuse of this discretion

has been shown; while the appellee contends that, after the excise board has entered upon the policy of granting wholesale licenses, it cannot curtail the number which shall be granted.

The issuance of liquor licenses is committed by the statutes to the discretion of the several boards authorized to grant the same. The power of the courts to review their decisions extends to determining whether the jurisdictional facts necessary to the granting of the license have been shown to exist, or to determine, in certain cases, whether the action of these tribunals has been arbitrary and unjust to such a degree that it is apparent that a legal and judicial discretion has not been exercised, or their discretion wantonly abused. The presumption is that the tribunal to whom the law has committed the exercise of a legal discretion has duly exercised the same, and the burden of proof is upon him who asserts to the contrary. There is no evidence in the record as to the number of wholesale liquor licenses issued in the city of Omaha, and there is nothing to show that there has been any attempt to establish a monopoly, or that the city council was not fully justified in restricting the number of wholesale licenses to be issued for 1915 to the number already issued when the resolution was passed. We must give the excise board the benefit of the presumption, and hold that it has not been shown that its action was arbitrary or illegal.

But it is urged by the appellee that to restrain or limit the number of wholesale licenses to any extent whatsoever is an unjust and arbitrary exercise of power. It is argued that the only lawful reason for permitting the number of retail liquor sellers in a city or town to be limited is on account of the liability on the part of the frequenters of saloons to be guilty of brawls, disorders and unseemly conduct; that the wholesale liquor trade is conducted in an entirely different manner, no drinking being allowed upon the premises; that it therefore stands in a different class, and any limitation as to the number of such dealers is arbitrary and unjust. We cannot take this

view. It may be true that the same reasons do not exist for the regulation of the wholesale liquor traffic as for the limitation of the retail traffic, and that it cannot be detrimental to the best interests of the commonwealth to allow an unlimited number of wholesale establishments; but this argument should be directed to the legislative department, and not to the judicial. The lawmakers have committed such questions of policy to the licensing bodies, and even though the law might have been otherwise, without serious damage to the public weal, we must take it as we find it.

Much was said in the argument in regard to a recent case in which an order of the district court allowing a license to a wholesale liquor dealer whose application had been rejected by the city council was affirmed by this court without opinion. The facts in that case are readily distinguishable from those presented here. In that case the application was filed prior to a number of others. No remonstrance or objections were on file, and there was nothing in the record to show that the applicant was not entirely fit to conduct the business. Several later applications were taken up by the city council and licenses granted. After this was done a resolution declaring that no more licenses should be granted was passed, and the applicant was left without a license. The district court held that such action was arbitrary and unjust, and this court took the same view.

The judgment of the district court is reversed and the cause remanded, with directions to revoke and cancel the license.

REVERSED.

HAMER, J., not sitting.

STATE, EX REL. WILL W. CRANDALL, APPELLANT, V. E. C. EICKHOFF ET AL., APPELLEES.

FILED OCTOBER 2, 1915. No. 18973.

Highways: BRIDGES: CONSTRUCTION: "STREAM." A stream of running water flowing between well-defined banks across a public road, and of sufficient width and depth to require the construction of a bridge on such road, is a "stream," within the meaning of section 3060, Rev. St. 1913.

APPEAL from the district court for Knox county: ANSON A. WELCH, JUDGE. *Reversed with directions.*

F. L. Bollen and *J. C. Robinson,* for appellant.

P. H. Peterson, contra.

FAWCETT, J.

This is an action in mandamus to compel the respondents, who are supervisors of Knox county, to construct and maintain a bridge over a stream of water on a public highway in the township of Herrick, in that county. On a hearing to the court, the action was dismissed at relator's costs. Relator appeals.

The action is based upon the following sections of the Revised Statutes, 1913:

"3060. In counties under township organization the expense of building, maintaining and repairing bridges on public roads over streams shall be borne exclusively by the county within which such bridges are located.

"3061. The county board of every such county shall build, maintain and repair every such bridge, and make prompt and adequate provision for the payment of the expense thereof."

That the road in question is a public road is conceded. The only disputed question, therefore, is as to whether the watercourse in controversy is a "stream," within the meaning of the statute. The evidence shows that the stream has its source in flowing springs located about 80

to 100 rods above the bridge; that in ordinary flood times it drains more than a section of land. The testimony varies as to its width and depth. One witness testified that the stream of water is about 11 feet wide and of an average depth of 3 or 4 inches; that the distance between the approaches, where the old bridge was, is 16 feet, and to the bottom of the stream 4½ feet. Another witness testified that it is 16 feet from bank to bank where the old bridge went out, and the water level is about 10 or 11 feet wide. Another gives the width as 11 feet, and the depth of the water 2 or 3 inches. The man who built the old bridge testified that the water is from 4 to 6 inches deep, and about 5 feet wide; that, in building it, he used eight-foot cedar posts, driven down, with 4x8 stringers nailed on each side, three-inch plank on top, and 10 feet wide. One witness testified that the old bridge was not large enough to accommodate the water at all times; that it should have been 20 feet wide, and about 3 feet higher, in order to carry the water in an ordinary rain. Another witness testified that, to put in a proper bridge, 20-foot piling should be driven down to about 6 feet and the bridge fastened to it; that a five-foot culvert would not do at times. There is no controversy over the fact that there is a continuous flow of water in the stream at all seasons of the year, both winter and summer, and that this has been true for 30 years or more.

A stream is defined in the Century Dictionary: "A course of running water; a river, rivulet, or brook." This definition was approved in *County of Dodge v. County of Saunders*, 70 Neb. 451. In 36 Cyc. 1334, it is said that the word "stream" has a well-defined meaning. Among these meanings given by the author is: "A current of water; a body of water having a continuous flow in one direction." In *Trustees of Schools v. Schroll*, 120 Ill. 509, 521, it is said: "The word 'stream' has a well-defined meaning, wholly inconsistent with a body of water at rest. * * * And this is so, independent of the size of the one or the other. The flowing rivulet of but a few inches in width is a stream as certainly as the Mississippi."

We are unable to see how we can give any other meaning to the word as used by the legislature in the act above quoted, without resorting to a forced construction of the language used. The statute in question was enacted by the legislature in 1887. Laws 1887, ch. 72. Prior to that time the law relating to the construction of bridges over streams in counties under township organization required such bridges to be constructed by the township in which the bridge was located, while in counties not under township organization the county was required to construct them. There being no just reason for any such distinction, the act in question was passed. The evident intention of the legislature was to require counties to provide the means of crossing all streams which would require the construction of a bridge. The justice of such a law cannot be questioned. A bridge, being in its very nature a substantial and permanent structure, which would necessarily cost a considerable sum of money, should be built by the county. We see no good reason why a township should be required to build an expensive bridge on a public road which is in general use, not by the township alone, but by the county generally. The evidence fully shows that the watercourse in controversy is a stream, within the meaning of the law and the intention of the lawmakers. The cost, therefore, of spanning it with a suitable bridge should be borne by the county.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judgment in accordance with the prayer of the relator.

REVERSED.

HAMER, J., not sitting.

ARTHUR B. CARTER V. STATE OF NEBRASKA.

FILED OCTOBER 2, 1915. No. 19149.

1. Criminal Law: APPEAL: RULINGS ON EVIDENCE. A conviction will not be reversed for errors in the admission or exclusion of evidence, unless it appears from the record that the defendant was probably prejudiced thereby.
2. ———: TRIAL: INSTRUCTION: "REASONABLE DOUBT." The instruction defining a reasonable doubt, set out in the opinion, sustained.
3. ———: ———: ———: PROOF OF ALIBI. The instruction set out in *Nightingale v. State*, 62 Neb. 371, 374, which announces the rule as to evidence tending to show an alibi, approved, and the rule reaffirmed.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Adams & Jeary, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and *Jesse B. Strode, contra.*

FAWCETT, J.

From a conviction of the crime of robbery, in the district court for Lancaster county, the defendant has prosecuted error to this court.

The brief of plaintiff in error, who will be designated as defendant, assigns 12 errors. The first nine assignments relate to the rulings of the court in the admission and exclusion of evidence. When the questions and answers referred to in these assignments are taken in connection with their context, it becomes apparent that no prejudicial error, if any at all, was committed.

The ninth assignment assails the ruling of the court in sustaining a motion to strike the answer to a question propounded to defendant while testifying as a witness in his own behalf. The crime with which defendant was charged, if committed by him, was committed in connection with one Frank Conan, who had testified as a witness for the state. Defendant was being interrogated as to Conan and

had testified that he knew him. "Q. I will ask you, Mr. Carter, were you with Frank Conan on Saturday night the 1st day of August last? A. No, sir. Q. I will ask you, do you know where you were Saturday night the 1st day of August? A. I certainly do. Q. Now, Mr. Carter, just tell the jury where you were and who was with you Saturday night, the 1st day of August. A. On Saturday night, the 1st day of August, I had an appointment with Harry Smith and Lee Chester at the pool hall, I don't remember who was owning it then, Eskew or Seiford, between O and P on Eleventh street, and I met him there, and we went down to Rohrig's saloon, or Jetter's saloon, which is the same thing; the same place, and had three glasses of beer, and came back to the pool hall, and got the horse and buggy, and went out over the O street viaduct, dug some fish worms on the north side of the road, came back to town, and went out to Eleventh and B, and we stopped at a store, and Harry Smith and Lee Chester went in and bought some lunch, and we went on out to High street over to Fourteenth, and on out three or four miles to the creek, and fished all night, and along about, oh, I should judge anywhere from 7 to 9 o'clock, we started back the next day, on Sunday, and I was not in town at any time during that time. I have been persecuted in this town for years by Jim Malone.

"Mr. Hager: The defendant moves to strike out the answer as not responsive to the question. Sustained. The defendant excepts."

The ninth assignment refers to the sustaining of this motion. A simple reading of the answer and the motion gives color to defendant's assignment, but it is argued with much force by the state that the motion to strike related simply to the last sentence in the answer, viz.: "I have been persecuted in this town for years by Jim Malone." (Mr. Malone was chief of police.) The answer above quoted up to this last sentence was so clearly responsive to the question, and the last sentence so clearly not responsive thereto, that it is apparent that counsel on both sides, the court and the jury could not have understood

of the instruction will be found set out in *Nightingale v. State*, 62 Neb. 371, 374. After quoting the instruction, we said: "This instruction, we think, is not subject to any just criticism."

A careful consideration of the entire record fails to disclose any prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HAMER, J., not sitting.

SALVATORE FRANCO V. STATE OF NEBRASKA.

FILED OCTOBER 2, 1915. No. 19152.

Criminal Law: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. The statutes have been so construed as not to allow a new trial after the term in which judgment has been rendered in a criminal case as it is in a civil case, and when it is conceded by the state that facts exist, as disclosed by circumstances after the trial, which could not have been known at the trial, and which have a direct bearing upon the question of the defendant's guilt, and, if unexplained, render it improbable that the defendant is guilty, a new trial will be awarded.

ERROR to the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed.*

Louis J. Piatti, John D. Wear and *John F. Moriarty*, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and *Harvey A. Brubaker, contra.*

SEDGWICK, J.

This defendant and one Antonio Turco were employed by the Nebraska Portland Cement Company at Superior as common laborers, and in the early morning of October 1, 1914, it is alleged the defendant killed the said Turco by shooting him with a revolver through the head. The shooting appears to have been conceded upon the trial.

The defense was that the defendant was insane and irresponsible. The trial resulted in a verdict of murder in the second degree, and the defendant was sentenced to 15 years in the penitentiary.

It is contended that the court erred in some of the instructions to the jury, but the principal contention is that the verdict is not supported by the evidence.

1. The second instruction given by the court upon its own motion was as follows: "To justify you in finding the defendant guilty of the crime of murder in the first degree as set out in the information, the state must establish and prove that the defendant, Salvatore Franco, on or about the 1st day of October, 1914, in the county of Nuckolls, and state of Nebraska, unlawfully, feloniously, forcibly, and purposely, with deliberate and premeditated malice, did assault one Antonio Turco by shooting him in the head with a pistol loaded with powder and leaden bullets, with the intention to kill and murder him the said Antonio Turco, and that as a result of said assault and wounds so inflicted by the defendant the said Antonio Turco, a human being, died."

The contention is that this instruction excluded the defense of insanity, and *Davis v. State,* 90 Neb. 361, is relied upon as supporting this contention. In that case the defense was insanity, and the court instructed the jury: "The jury is instructed that the law presumes that a person intends all the natural, probable and usual consequences of his acts; that when one person assaults another violently with a dangerous and deadly weapon, likely to kill, not in self-defense, or in defense of habitation or property, and not in a sudden heat of passion or sudden quarrel, and the life of the person thus assaulted is actually destroyed in consequence of such assault, then the legal and natural presumption is that death or great bodily injury was intended, and in such case the law implies malice and such killing would be murder."

The circumstances attending the homicide were proved by eye-witnesses, and the court, with the exception of one judge, considered that in such case it was erroneous to in-

struct the jury that the law implies malice, under the authority of *Vollmer v. State,* 24 Neb. 838, *Lucas v. State,* 78 Neb. 454, and *Kennison v. State,* 80 Neb. 688. Three of the members of the court thought that this error was prejudicial to the defendant so as to require a reversal. A majority of the court, however, concluded that the error was not so prejudicial as to require a reversal, but the judgment of the district court was reversed for another reason. Three of the judges who considered the errors in the instruction quoted so prejudicial as to require a reversal considered that the defense of insanity was wholly excluded by this instruction, because it told the jury that, under the facts recited in the instruction, "the law implies malice and such killing would be murder." In the case at bar no such objection can be urged to the instruction quoted. The jury were told that, to justify them in finding the defendant guilty, they must find certain facts, one of those facts being that the act was done "with deliberate and premeditated malice," and in another instruction the court told the jury: "As you have been told, it is essential to the crime of murder, either in the first or second degree, that it must be done intentionally, and it follows that the mind must have been capable of forming the intent and carrying it into execution, and of knowing the nature and effect of the act committed, in order to make one charged with crime criminally guilty; * * * and, even though you may be satisfied that the defendant committed the act charged against him in the information, yet, unless you are further satisfied beyond a reasonable doubt, upon a view of the whole evidence, that at the time the defendant committed the assault he had a sufficient degree of reason to know and was capable of understanding what he was doing, and had sufficient understanding to know that his act was wrong, then the law will not hold him criminally responsible for what he did, and, unless you are so satisfied beyond a reasonable doubt, you should acquit him of every degree of the offense charged." This language was not inconsistent with the instruction that, to justify a finding of guilty, they must find that the act was done with

deliberate and premeditated malice. It especially tells the jury that there could be no deliberate and premeditated malice if the defendant was insane at the time.

2. The court also instructed the jury: "It does not devolve upon the defendant to prove by a preponderance of the evidence that he was insane at the time of the offense charged, nor that he is insane now, but if the evidence upon that subject is sufficient to raise a reasonable doubt, as defined in these instructions, as to his sanity, then he should be acquitted." The words "nor that he is insane now" were, of course, unnecessary in this instruction. It would have been perhaps better to have omitted them, but we cannot see how that could have prejudiced the defendant. Also the expression, "if the evidence upon that subject is sufficient to raise a reasonable doubt," might provoke technical criticism. The evidence of insanity might be sufficient to raise a reasonable doubt, although the whole evidence, taken together, was sufficient to remove that doubt. This language was favorable to the defendant. It might lead the jury to think that, if the defendant had introduced sufficient evidence to raise a doubt as to his sanity, no counter evidence of the state would be availing.

3. Whether the evidence is sufficient to support the conviction is a more serious question. It appears that the defendant had been engaged in this employment for about three months; that he and the deceased were of the same nationality and had been friends during that time. During the day prior to the shooting, an altercation had arisen between them, and in that altercation the deceased, who was an older man than the defendant, had used great violence against the defendant, striking several blows with a shovel, one upon the defendant's head, which was so serious as to render the defendant temporarily unconscious. The defendant, after the shooting, escaped, and for nearly four days wandered around, until he was found on the fourth day some 40 miles from the scene of the tragedy. Soon after he received the blow upon the head he complained of being sick, and only worked about a half hour that afternoon. There was other evidence tending to prove

that he was so affected by the injuries he had received as to be incapable of self-control and irresponsible for his acts. The evidence was conflicting. The jury found against the defendant, and the trial judge, after a careful and apparently fair trial of the defendant, refused to set aside the verdict, and sentenced the defendant, as already stated. There is in this case, however, an unusual and important consideration which, in view of the inconclusive character of the state's evidence, leads us to conclude that this judgment should be set aside. Soon after the trial, the defendant was taken to the penitentiary, and the next day he was examined by the prison physician and found to be insane, and by order of the board of control was transferred to an asylum. In the asylum an operation was performed to relieve the effects of the injury to his skull caused by the blow he had received at the hands of the deceased, and it was then determined that he was insane as the result of this blow upon the head. While these matters that took place after the trial are not shown by the record, they were stated in court upon the argument and concurred in by the attorneys for the state.

In the early case of *Bradshaw v. State,* 19 Neb. 644, this court held that the statute authorizing a new trial after the term for newly discovered evidence did not apply to criminal cases. Judge Maxwell, who wrote the opinion, expressed regret that such was the case, in these words: "The writer desires to add that the rule permitting a petition for a new trial to be filed at any time within one year from the rendition of the judgment in civil actions should, where there is newly discovered evidence, the effect of which is to cast doubt on the correctness of the verdict or show the defendant's innocence, be extended to criminal cases. Such a rule, in cases of conviction upon circumstantial evidence, if properly guarded and applied, would throw an additional safeguard around the innocent, and tend to the promotion of justice; but in the absence of legislation to that effect the courts are without authority in the premises." Since the legislature has taken no action in that regard, this court reluctantly followed

that decision in *Hubbard v. State,* 72 Neb. 62, and in *Evers v. State,* 87 Neb. 721. In the latter case the above suggestion of Judge Maxwell is quoted. If an application for new trial after term was allowed in criminal as in civil cases, there can be no doubt that under the circumstances admitted in this case that remedy would be effective. If the trial had been delayed for a few days and the effects of the defendant's injuries could have been shown, it is at least probable that the result of the trial would have been different. The attorneys for the state were in the line of duty in informing the court of these facts. We cannot affirm a judgment that is conceded to be unjust.

The judgment of the district court is reversed and a new trial awarded.

REVERSED.

LETTON, J., concurs in conclusion, for other reasons.

ROSE, J., dissenting.

HAMER, J., not sitting.

ANTON JELINEK, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 16, 1915. No. 18300.

1. **Street Railways: INJURY TO PASSENGER: NEGLIGENCE.** It is not negligence *per se* for a street car passenger to take a position with one foot on the steps of the car, with one hand holding onto the handrail, and one foot swinging in the air preparatory to alighting at his place of destination.

2. ———: ———: ———: ASSUMPTION OF RISKS. But, in taking such a position, the passenger assumes the risks incident to the careful, ordinary and necessary operation of the car.

3. ———: ———: ———: BURDEN OF PROOF. If, under such circumstances, the passenger is injured by slipping from the steps while the car is in motion and before it reaches its usual stopping place,

he must prove that his slipping from the steps was occasioned by the negligent operation of the car, which was the proximate cause of his injury.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

John L. Webster, W. J. Connell and *W. R. King,* for appellant.

Weaver & Giller, contra.

BARNES, J.

Action to recover damages for personal injuries alleged to have been caused plaintiff by the negligence of the defendant street car company. On the trial in the district court for Douglas county the plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that plaintiff, on the morning of January 24, 1911, met with an accident in alighting from one of defendant's cars, west-bound on Cuming street, in the city of Omaha, at a point between Twenty-first and Twenty-second streets. It was alleged in plaintiff's petition, in substance, that he had proceeded to the car steps to be ready to get off; that the car did not come to a stop; that he asked the conductor if he should get off; the conductor told him to get off, and at that time the car took a sudden lurch forward, which caused plaintiff's foot to slip off the car steps to the pavement; that he took several steps while holding onto the handrail of the car, and thereupon the conductor grabbed hold of his arm and again told him to get off the car; that the speed of the car and the action of the conductor caused him to lose his hold and fall to the pavement, which fall resulted in the injuries of which he complained.

Defendant, by its answer, denied that at the time and place described in plaintiff's petition there was any unusual movement of its car, denied that the conductor told plaintiff to get off the car, or in any way indicated to him that he should alight before the car stopped, and denied that the conductor jerked the plaintiff's arm or loosened

his hold on the handrail of the car. The answer also alleged, in substance, that, when the car on which plaintiff was riding reached the point about the center of the block between Twenty-first and Twenty-second streets while going west on Cuming street, the conductor gave a signal to the motorman to stop at the west side of Twenty-second street; that immediately thereafter the plaintiff, who was standing on the rear platform of the car, walked to the edge of the platform and stepped down upon the steps of the car; that defendant's conductor warned plaintiff not to alight until the car should stop; that before the car reached Twenty-second street, and while it was running at a rapid rate of speed, plaintiff, disregarding his own safety and the warning of the conductor, negligently and carelessly stepped from the car to the street, and thus sustained the injuries of which he complained, and which were due entirely to his own negligence in stepping from the moving car. The reply was a denial of the allegations of the answer.

The foregoing is the substance of the pleadings on which the cause was tried in the district court.

Among other assignments of error, appellant contends that the evidence was not sufficient, either in law or fact, to sustain a verdict and judgment for the plaintiff. It was conceded that plaintiff, when the accident occurred, was a passenger on defendant's car; that he was unable to talk with the conductor in the Polish, Bohemian or English language. On the trial plaintiff testified, in substance, that he did not talk to the conductor in either of those languages, but told him as best he could: "Mr. Conductor, I would like to have you notify me when I get to Twenty-second and Cuming street." The conductor asked him if he did not know the streets in Omaha, and then said: "Well, go inside, I will let you know when we get to Twenty-second and Cuming." He said: "There ain't very many passengers in the car; there is lots of room. You better go in the car." The question was asked: "What did the conductor do about notifying him for Twenty-second and

Cuming street?" The conductor opened the door and said: "Come on, here is your street." Plaintiff came out onto the platform, took hold of the handle with his left hand, and with his left foot stepped down onto the step, his right foot being loose in the air ready to step off the car. He then said to the conductor: "Is this place for me? Is this my stopping place?" The conductor said something to him, and a whole lot in English which he couldn't understand, and then said: "Here is the place for you. You better get off here." While the conductor was talking to him, the car gave a sudden lurch and he slipped off. The car kind of jerked him before he got his footing. He still held on with his left hand and got his footing and ran along with the car for 15 or 20 steps. He thought probably the car would stop. He says the conductor walked up to where he was and said, "G— d— it, what is the matter with you? Don't you know any better than that?" and grabbed him by the hand, and his hand slipped off of the handle and he went down, and that is all he knows. On cross-examination he testified that the car gave a jerk and went faster, and that is what caused him to fall off in the first place; that he could not tell whether the car was half way between Twenty-first and Twenty-second street or on Twenty-second street; that he knew it was customary to stop on the far side of the crossing to let passengers off; that he knew where the car *ought* to stop, but did not know where it *would* stop; that he could not tell the speed at which the car was going; that the only thing he heard the conductor say before he went off the car was, "Come on, this is the place for you here;" that was when he was opening the car door; that the conductor did not use the language above quoted until after he got off and was running alongside of the car; that the conductor grabbed him by the hand, but he did not remember what he did; that he could not say whether the conductor pushed him out or tried to pull him in; that he did not touch him until his feet were on the pavement and he was running along; that the last he remembers was that the conductor grabbed him and said: "What the hell is the matter with you?" He

further testified that he did not know whether there was any one on the rear platform or not; that he did not look.

All of the other witnesses to the accident deny that the conductor told the plaintiff to get off, deny that he ran along beside the car, and testify that he stepped off the car while it was running at a speed varying from six to ten miles an hour, and that the plaintiff then and there fell to the pavement.

In rebuttal plaintiff called as witnesses F. H. Moyer and Milton Freeman, who testified that they saw the accident; that they saw plaintiff fall from the car to the street, and the place where they thought he fell. It appears from the testimony of some of the plaintiff's own witnesses that the jerk of the car, of which he complained, was caused by a slight acceleration of speed, amounting to about one mile an hour.

The foregoing is the testimony on which the jury rendered the verdict of which appellant complains. As we understand the record, plaintiff failed to establish any negligence on appellant's part. It must be conceded that plaintiff either alighted or slipped from the step before the car stopped, while it was in rapid motion, and before it reached the far side of Twenty-second street, which was the place of plaintiff's destination. There was no evidence of any unusual motion of the car or of any negligence in its operation. Plaintiff failed to show such an acceleration of speed as would cause him to be jerked off the car step. The fact that the speed was increased at a rate of one mile an hour was not shown to amount to any unusual movement of the car not incident to its careful operation. Plaintiff was unable to say that the act of the conductor in grabbing hold of his arm or coat sleeve broke his hold on the handrail, but stated that he did not know whether the conductor was trying to force him off or pull him onto the car steps. It must be conceded that, in order for plaintiff to recover, it was necessary for him to prove some act of negligence on defendant's part which was the proximate cause of his injury. There are many cases which hold that plaintiff could not excuse himself for

getting off a moving car because of an invitation or command of the conductor, unless it was accompanied by force. In deciding this case it hardly seems necessary to refer to the authorities first cited by appellant. We think it must be conceded that for plaintiff to take a position on the steps of the car preparatory to alighting at his destination was not such negligence *per se* as would defeat a recovery. *Bendekovich v. Omaha & C. B. Street R. Co.*, 80 Neb. 174. However, so far as we are able to ascertain, it has never been held that by so doing the plaintiff did not assume the risks incident to the ordinary and usual operation of the car. If the acceleration of speed complained of by plaintiff was only such as was consistent with a careful operation of defendant's car, plaintiff was not entitled to recover. *Quick v. Wyandotte & D. R. Railway*, 143 Mich. 443; *Bradley v. Ft. Wayne & E. R. Co.*, 94 Mich. 35; *McGann v. Boston E. R. Co.*, 199 Mass. 446; *Ottinger v. Detroit United Railway*, 166 Mich. 106; *Etson v. Ft. Wayne & B. I. R. Co.*, 110 Mich. 494; *Boston E. R. Co. v. Smith*, 168 Fed. 628; *Rhea v. Minneapolis Street R. Co.*, 111 Minn. 271. Plaintiff produced no evidence showing negligence in the operation of the car.

As we view the record, appellant's contention is well founded, and therefore we deem it unnecessary to consider the other assignments of error. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J. I concur in the conclusion, on the ground that the evidence does not sustain the verdict.

FAWCETT and HAMER, JJ., not sitting.

BARNEY WISEBLOOD, APPELLEE, V. OMAHA MERCHANTS EXPRESS & TRANSFER COMPANY, APPELLANT.

FILED OCTOBER 16, 1915. No. 18308.

1. **Negligence: PERSONAL INJURY: LIABILITY.** Where a transportation company, employed for a consideration to move a heavy machine from the factory of a manufacturer to the freight depot of a railroad, furnishes a broken or defective appliance for that purpose, by reason of which one of the servants of the manufacturer is injured while assisting in an effort to place the machine on the wagon of the transportation company, the last named company is liable for damages to the person injured.
2. ———: ———: ———. A settlement with his employer, by the injured person, and a release which expressly reserves his right of action against the transportation company, will not defeat his action against the company which furnished the broken or defective appliance.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Morsman, Maxwell & Thompson, for appellant.

Martin L. Sugarman, W. C. Fraser and *J. C. Kinsler, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Douglas county in an action for personal injuries sustained by the plaintiff on account of the alleged negligence of the defendant.

An examination of the record will show the following facts: F. P. Kirkendall & Company was running a shoe factory in the city of Omaha, and the appellee was in the employ of that company at the time he received the injuries for which the judgment in this action was recovered. The Omaha Merchants Express & Transfer Company was engaged in the transportation of freight from factories and warehouses to the various freight depots in the city of Omaha. On the 4th day of June, 1912, Kirken-

dall & Company telephoned to the Omaha Merchants Express & Transfer Company to get a heavy shoe machine, which was ready for shipment, and take it from its building to the Burlington freight depot. Appellant was advised that the machine weighed about 2,000 pounds, and, in answer to the inquiry, was told that Kirkendall & Company had no appliances for loading the machine, and that appellant should send everything that might be needed for the purpose. Shortly afterwards appellant sent one of its men to get the machine and take it to the depot. He was provided with a wagon and team and certain moving appliances, consisting of blocks, ropes, rollers, and two heavy skids or planks. He drove into the alley at the rear of the Kirkendall building and backed his wagon up to the south door. The sill of the door was about 18 inches above the bed of the wagon. He then went into the building and asked where he would find the machine that he was to take to the depot. It had already been crated for shipment and was standing near the door at which the wagon had been placed. The driver attempted to move the machine, but, finding it too heavy, he asked for help. He was told that there was no one to help him, and he made another attempt to move it, but without success. Edward C. Beil, who was in the employ of Kirkendall & Company, and the person who had telephoned to the appellant, sent an inquiry by the elevator boy to one Shanahan, who was the superintendent of the Kirkendall factory, and asked for some men to be sent down to help load the machine onto the wagon. Shanahan thereupon sent Barney Wiseblood, the appellee, and several other men, among them William McGill, to the first floor, with instructions to help put the machine onto the wagon. The driver, with the assistance of these men, rolled the machine around to the door and got it in place for loading. He then took two skids, which appellant had sent with him for the purpose, and placed them so as to extend from the door-sill down onto the bed of the wagon. Each of these skids was about three inches thick, four inches wide, and twelve feet long. They were laid so that they were about eighteen inches apart, the

north ends extending up about four or five inches onto the door-sill. Each of these skids had been fitted with a heavy iron strip about two inches wide, which was bolted to the lower side of the skid or plank, and turned downwards at the outer or north end, thus forming a hook or clamp about two inches in width, which should hold onto the door-sill, or presumably onto anything on which it rested. The easterly one of the two skids was provided with such an attachment, including the hook, but the hook on the westerly one of the two skids had been broken off, and this was the defect which it was claimed subsequently caused the injuries to the plaintiff. After appellant's driver put the skids in place to lower the machine onto the wagon, McGill noticed the defective condition of the westerly skid, and called it to the attention of appellant's driver, stating that he did not believe it would hold. The driver insisted on using the skid, and stated that it would hold, and said that he would hold the opposite end of it with his crowbar. He then got into the wagon, put his bar under or against the south end of the defective skid, and told McGill he was ready for the machine to be tipped over onto the skids. Wiseblood had been stationed on the west side of the machine to steady it as it went down the skids onto the wagon. As soon as the machine went onto the skids, the west one with its defective hook, in spite of the fact that the driver was holding it with his bar, gave way or slipped off the door-sill, and caused the machine to be thrown over onto Wiseblood, who went to the ground under its weight. Appellant's driver immediately drove away with his wagon and skids and left the others to remove the machine from the body of Wiseblood. The testimony shows that the east skid, which was provided with a hook, clung to its place on the door-sill, and remained there when the machine tipped over to the west and fell to the ground. Wiseblood received injuries, which were not only serious, but permanent. A guardian was appointed for him, who afterwards executed a separate release to F. P. Kirkendall & Company. The consideration of this release was $1,000, and it was expressed therein

that it was a settlement with Kirkendall & Company only, and the right was reserved thereby to bring an action against the Omaha Merchants Express & Transfer Company. On the trial the jury found generally for the plaintiff, and that he had been damaged in the sum of $6,500. After deducting the $1,000, which had been paid to him by Kirkendall & Company, a verdict was returned in Wiseblood's favor for $5,500, on which the judgment complained of by this appeal was rendered.

The president of appellant company, on the trial, testified, in substance: We have a pile of tools, plates, planks, rope and tackle that would fill one-half of this room clear to the ceiling, and jacks and bars, and plates, and everything for anything you want to use them for. Whenever a teamster is sent to the barn to get appliances he makes his own selection from what he finds there. He goes out and gets the stuff. There is no serious conflict in the evidence in this case, as we read the record.

Appellant contends that, granting the skid in question was defective, still the furnishing of the same to Kirkendall & Company did not make appellant liable for injuries received by Wiseblood, because there intervened an independent responsible agent breaking the causal connection between appellant and Wiseblood; in other words, that appellant was not liable for injuries to Wiseblood by furnishing defective appliances to Kirkendall & Company, Wiseblood not being the servant of appellant. It is argued that, because there was no contractual relation existing between Wiseblood and the appellant, it was not liable to him for the injuries which he had sustained. We think this contention can hardly be sustained. Thompson in his Commentaries on the Law of Negligence (Vol. 8, sec. 831) says: "It may be stated as a general rule that one who undertakes to furnish appliances for use by others assumes the duty to furnish proper appliances, and that a negligent performance of such duty resulting in injuries to those lawfully using the appliances renders the person furnishing the appliance liable for such injuries, and such obligation does not depend on a contractual relation be-

tween such person and the person injured, but rests rather on a failure to perform a duty assumed by one which results in injury to another." This rule is supported by *McMullen v. City of New York*, 97 N. Y. Supp. 109; *Dougherty v. Weeks & Son*, 111 N. Y. Supp. 218; *Pennsylvania R. Co. v. Hummel*, 167 Fed. 89; *Roddy v. Missouri P. R. Co.*, 104 Mo. 234; *Savannah, F. & W. R. Co. v. Booth*, 98 Ga. 20; *Chicago, I. & L. R. Co. v. Pritchard*, 168 Ind. 398; *Sheltrawn v. Michigan C. R. Co.*, 128 Mich. 669; *Hale v. New York, N. H. & H. R. Co.*, 190 Mass. 84; *Perrine v. Union Stock Yards Co.*, 81 Neb. 790.

Appellant contends that the trial court erred in refusing to direct a verdict in its favor. This assignment, of course, again raises the contention that there was no contractual relation existing between appellant and plaintiff at the time he was injured. It is further urged that the skid was not defective. This question, however, was submitted to the jury, and it was decided by that body that the skid was defective, as alleged in the plaintiff's amended petition, and that the use of the defective skid furnished by appellant caused plaintiff's injury. The undisputed evidence shows that the appellant's driver was using the skids in his own way at the time of the accident, notwithstanding the suggestion of McGill that the skid was not safe; that the skid with the unbroken hook held its place, while the one with the broken hook gave way and caused the machine to be thrown upon the plaintiff.

It is neither necessary nor profitable to discuss appellant's other assignments of error. As we view the record, the judgment of the district court should be, and is,

AFFIRMED.

FAWCETT, SEDGWICK and HAMER, JJ., not sitting.

STATE, EX REL. WILLIS E. REED, ATTORNEY GENERAL, RELATOR, V. HANSON M. GRIMES, DISTRICT JUDGE, RESPONDENT.

FILED OCTOBER 16, 1915. No. 19369.

Statutes: CONSTRUCTION. "In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity." *Kelley v. Gage County*, 67 Neb. 6.

ORIGINAL proceeding in mandamus to compel respondent to provide for holding court in Arthur county. *Writ allowed.*

Willis E. Reed, Attorney General, for relator.

BARNES, J.

Original action in mandamus. It appears from the petition of relator and the answer of respondent that the legislature, by its act of 1915 (Laws 1915, ch. 12), entitled "An act to amend section 217, Revised Statutes of Nebraska for 1913, relating to apportionment of judicial districts, and to repeal said original section," omitted the name of the county of Arthur as included within the thirteenth judicial district, and failed to include that county in any of the other judicial districts of this state, and the respondent has refused to designate a time for holding any term or terms of court in that county, for the sole reason of the doubt as to whether or not he has jurisdiction so to do. The relator asks for a peremptory writ of mandamus requiring the respondent to provide for holding his court in said county. There is no disputed question of fact in this case, and the only question to be determined is whether Arthur county is a part of said judicial district.

It appears that McPherson county, since its organization, has been a part of the thirteenth judicial district, and Arthur county was attached to that county for elec-

tion, judicial and revenue purposes before Arthur county was organized. In the year 1913, and since that time, it has been a part of that district. It further appears that the legislature of 1915, by its passage of the act above mentioned, sought simply to change the boundaries of judicial districts numbered 8 and 9, and provide for two judges in the last-named district. It sufficiently appears that this was the sole purpose of the act of 1915. The fact that no mention of Arthur county was made in that act did not exclude it from the operation of the laws or judicial authority of the state, and, since it was not the purpose of the legislature to remove it from the district, it is still to be considered as within its boundaries. "In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity." *Kelley v. Gage County*, 67 Neb. 6. See *State v. Taylor*, 90 Kan. 438.

For the foregoing reasons, the peremptory writ is allowed.

WRIT ALLOWED.

THOMAS J. COYNE, APPELLANT, V. IDA DAVIS, APPELLEE; JAMES A. DONOHOE, INTERVENER, APPELLANT.

FILED OCTOBER 16, 1915. No. 17810.

1. **Wills: CONSTRUCTION: DIRECTION TO SELL LANDS: EQUITY.** As a general rule, where a testator directs the sale of a specific tract of land for the purpose of paying certain bequests from the proceeds, a court of equity will consider that the conversion of the land into personalty has taken place. The fact that the time of the sale is postponed for a definite term is not material, and the conversion will be held to have been made at the time of the testator's death.

2. ———: ———: **REQUEST: VALIDITY.** By the will of a man of Swedish parentage, a bequest was made to the "Swedish Mission Society of Chicago, Illinois." No corporation or association of that name existed at the time of the making of the will or of the testator's death, but the evidence shows that a corporation whose proper name is the "Swedish Evangelical Mission Covenant in America" is

commonly known among Swedish people as the "Swedish Mission Society;" that its headquarters are in Chicago, Illinois; that deceased for a time attended a church of such denomination in Omaha, was personally acquainted with a number of its ministers, and for years had taken a Swedish paper published in the interest of such society, *Held*, that the intention of the testator was to make the bequest to the "Swedish Evangelical Mission Covenant in America," and that the same was a valid bequest.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

M. F. Harrington, J. J. Harrington and *J. A. Donohoe*, for appellant.

Sullivan & Rait, contra.

LETTON, J.

This action was brought to quiet the title of plaintiff to an undivided one-half interest in 160 acres of land, and praying for partition thereof. James A. Donohoe intervened, claiming the other one-half interest, and asked the same relief as plaintiff. The defendant, Ida Davis, claimed title to the entire 160-acre tract. The court found in her favor, quieted the title in her, and dismissed the action of both plaintiff and intervener. Plaintiff and intervener claimed title to the property by conveyances from David Johnson and Hannah K. Hammer, who were the children and heirs at law of one Solomon Johnson, who died testate on the 15th day of March, 1900, in Holt county, Nebraska. Johnson, together with his wife, Ida, lived upon the land in controversy as their family homestead. Some time after his death his widow, Ida, intermarried with one Davis, now deceased. She continued to remain in possession of the land, and is the principal defendant in the suit. By his will, which was duly probated and allowed, Solomon Johnson gave his wife his furniture and household goods, directed her to use $250, which he had in the bank, toward paying off a $400 mortgage upon the farm, and to sell enough of the personal property to make up the balance due on the mortgage. He provided that she should

place monuments upon his grave and upon that of his first wife. The remaining portion of the will, the construction of which is determinative of the issues involved in this case, is, as follows:

"Fifth. I am the owner of the southwest quarter of section fourteen (14) in township twenty-eight (28) north, of range nine (9) west. I want my wife, Ida Johnson, to have and to hold said lands with all their belongings for her own use for a period of five years from the first day of January, 1901, to the first day of January, 1906, together with the residue of my personal property, and pay all taxes which may become due on said lands. After January first, 1906, I wish my wife, Ida Johnson, to sell said lands and to have and to hold for herself and her heirs one-third of the proceeds from such sale of all my property.

"Sixth. To each of my granddaughters, Ida and Frida Hammer, I give and bequeath the sum of one hundred and twenty-five dollars.

"Seventh. I give and bequeath to my son David Johnson, the sum of one hundred dollars.

"Eighth. I give and bequeath to the Lambert Presbyterian Church as located in Verdigris Township, Holt County, Nebraska, to have and to hold, the sum of fifty dollars.

"Ninth. I give and bequeath to the Methodist Episcopal Church of Page, Nebraska, to have and to hold, the sum of fifty dollars.

"Tenth. The residue of my property or the residue of the proceeds of the sale thereof, I give and bequeath to the Swedish Mission Society of Chicago, Illinois, to have and to hold, for whatever purpose they may see fit.

"Eleventh. It is my will that none of these bequests be paid until all my property shall be sold.

"Twelfth. I hereby make my wife, Ida Johnson, executrix of this my last will and testament."

The executrix paid all the bequests.

Plaintiff's contention is that the Swedish Mission Society was at the time of the death of Johnson a foreign corporation and incompetent to take or receive real estate

in Nebraska, or was not in existence at that time; that, this being so, the interest devised to that society passed by inheritance to the heirs of the testator, to whose interests the plaintiff and intervener have succeeded by purchase; and that they may elect to take the land instead of its proceeds. Plaintiff also attacks the validity of a sale of the land made by defendant to one Woodruff, who reconveyed to her. Defendant insists that the bequest to the Swedish Mission Society was in fact intended to be made by the testator to the Swedish Evangelical Mission Covenant in America, an Illinois corporation; that such corporation was commonly known among Swedish people as the "Swedish Mission Society of Chicago, Illinois;" and that at the time of the death of the testator it was in being and competent to take a bequest of personalty. She further contends that by the terms of the will an equitable conversion was made of the real estate into personalty; that she has sold the land and paid all debts, legacies and bequests under the will. The reply pleads that defendant elected to take the property as land, and not as personalty; that it has never been sold; and that she is now holding it under the homestead laws of Nebraska. The Swedish Mission Society made default, and a decree was entered against it, finding it had no interest in the property.

It is clear from the evidence that the sale to Woodruff and the reconveyance were mere colorable and voidable transactions, liable to be set aside at the action of the residuary legatee if dissatisfied.

If an equitable conversion of the land into personalty took place, and a competent legatee was in existence at the time the will took effect, the plaintiff and intervener never had an interest in the land and have no cause of action. On the other hand, if the conversion did not take place at the testator's death, and could not do so until a sale was made, the legal title to the land, not having been disposed of, rested in the heirs, and, no valid sale having taken place, the conveyance from them passed it to the plaintiff and intervener.

The rule seems to be that, when land is imperatively directed to be sold, it is considered as converted into money from the death of the testator. If the executor has the option whether to sell or not, or if he is merely given authority to sell, without being directed to do so, then it remains as real estate until the conversion takes place. *Chick v. Ives,* 2 Neb. (Unof.) 879; *In re Estate of Willits,* 88 Neb. 805; *Harrington v. Pier,* 105 Wis. 485. The fact that the time of making the sale is postponed by the will to some time in the future is not material as affecting the condition of the bequest. Equity regards it to have been the intention of the testator to pass the property to the objects of his bounty as personalty, and, this intention becoming effective at his death, the property will be regarded as being personal property at that time. *Martin v. Sherman,* 2 Sandf. Ch. (N. Y.) 341; *Boland v. Tiernay,* 118 Ia. 59; *Nelson v. Nelson,* 36 Ind. App. 331; *Beaver v. Ross,* 140 Ia. 154, 20 L. R. A. n. s. 65, and note; *Bates v. Spooner,* 75 Conn. 501; *Crane v. Bolles,* 49 N. J. Eq. 373; *Burbach v. Burbach,* 217 Ill. 547; 3 Pomeroy, Equity Jurisprudence (3d. ed.) sec. 1160.

With respect to the claim of the appellant and the finding of the district court that the Swedish Mission Society of Chicago was an organization which existed in South Chicago about 30 years ago, and that it had ceased to exist before the time the will was made, the evidence is substantially as follows: For the plaintiff a witness relates a conversation in which he says that Mr. Johnson told him of a Swedish preacher who had helped him in Sweden, and whom he said he met in Chicago after he came to this country; that the preacher's address was South Chicago; that this preacher had helped him more than his children, and that he was going to will part of his property to him; that he sent him $5 every New Year for the last few years, or for a few years, the witness was not sure which. On cross-examination he testified that he would not say the address was not 81 Clark street, Chicago. He could not give the name of the preacher, but would not say it was not Bjork, Frickman or Wenstrund. He testified he sent

a letter addressed to the Swedish Mission Society at South Chicago and the letter came back. The witness was not familiar with Chicago, and did not know that 81 South Clark street was in the heart of the city. On the other hand, the scrivener who drew the will testifies that Mr. Johnson gave him the name of the organization in Swedish; that he could not understand it, and asked it to be given him in English; that Johnson and his wife spoke together, and then gave him the name as the Swedish Mission Society. The evidence shows that there are 21 religious and charitable corporations incorporated in the state of Illinois using the word Swedish in their title, but that only two use the word Mission as part of the title.

Mrs. Davis, formerly Mrs. Johnson, testified that after their marriage Mr. Johnson and she attended the Swedish Mission church in Omaha; that a Mr. Hultman was the preacher; that the president of the organization was Mr. Bjork, who came to Omaha and preached occasionally; that John Wenstrund was there many times and preached; that Johnson knew Mr. Wenstrund, Mr. Bjork, Mr. Frickman, and Mr. Herpje, the ministers, personally; that for years Johnson took a Chicago paper, named the "Swedish Mission Friend," and that she still takes it; that there were churches of that denomination in Omaha, at Wausa, Nebraska, Fremont, and Des Moines, Iowa; and that among Swedish people it is often called the Swedish Mission Society.

The county judge testified that he wrote to the Swedish Mission Society of Chicago and received an answer from one Herpje, the secretary.

Mr. Wenstrund testified that the organization to which he belonged was often called the Swedish Mission Society; that he frequently received letters addressed in that manner; that the organization carried on home missions, maintained a home for old women in Chicago, and carried on schools in Alaska, and foreign missions in China; that he had known a Solomon Johnson in Omaha who attended church in Omaha at the Swedish Evangelical Mission Covenant church in that city; that the Swedish paper, known

as the "Mission Friend," was at one time owned by the synod to which he belonged, but was afterwards sold, but still circulates among Swedish people as a religious paper and contains news of the church; that the proper name of the corporation is the Swedish Evangelical Mission Covenant in America; that it is often called by newspapers the Mission Covenant or the Covenant, and that the use of the name "Swedish Mission Society" is a very common one among Swedish people. He also testified to receiving as treasurer of the society $31 from the executrix of the estate of Solomon Johnson, deceased, as the residue due to the corporation. As said before if this was incorrect and fraudulent, the society may call the executrix to account.

From a consideration of this evidence, we are satisfied that the proper name of the organization to which Solomon Johnson intended his bequest to go is the Swedish Evangelical Mission Covenant in America, and that the corporation was competent to receive the same. *Second United Presbyterian Church v. First United Presbyterian Church,* 71 Neb. 563. This being the case, the bequest did not lapse and there was no interest left undisposed of by the will. No property, therefore, was inherited by the heirs, and the plaintiff and intervener, who purchased their interests in the estate, received nothing.

The conclusion reached by the district court is right, and its judgment is

AFFIRMED.

HAMER, J., concurring.

I concur with Judge Letton's opinion.

The plaintiff claims to own an undivided one-half interest in the land in controversy and the intervener claims to own the other half. Solomon Johnson, the testator, was the owner of the land at the time of his death. The defendant, Ida Davis, was then his wife. She afterwards married Davis, who has since died. The plaintiff prays to be adjudged the owner of an undivided one-half interest in the land and entitled to the possession thereof, and

he also seeks to enjoin all parties from asserting any title or interest, except James A. Donohoe, the intervener.

The deceased made a will on the 10th day of March, 1900. The defendant, Ida Davis, claims the legal title to all the land and the right of possession. The will makes a bequest to Ida and Frida Hammer, the testator's grandchildren. It also makes a bequest to the Lambert Presbyterian Church of Verdigris, in Holt county, and a bequest to the Methodist Episcopal Church of Page. The tenth clause of the will provides: "The residue of my property or the residue of the proceeds of the sale thereof, I give and bequeath to the Swedish Mission Society of Chicago, Illinois, to have and to hold, for whatever purpose they may see fit." The fifth clause provides: "I want my wife, Ida Johnson, to have and to hold said lands with all their belongings for her own use for a period of five years from the first day of January, 1901, to the first day of January, 1906, together with the residue of my personal property, and pay all taxes which may become due on said lands. After January first, 1906, I wish my wife, Ida Johnson, to sell said lands and to have and to hold for herself and her heirs one-third of the proceeds from such sale of all my property."

The eleventh clause provides: "It is my will that none of these bequests be paid until all my property shall be sold." The twelfth and last clause makes Ida Johnson the executrix under the will. The name of the residuary legatee as it appears in the will is not correct, the true name being "Swedish Evangelical Mission Covenant in America."

The defendant, Ida Davis, conveyed the land by deed to William A. Woodruff for the alleged consideration of $1,200. She signed this deed as "Ida Davis, formerly Ida Johnson, executrix." This deed is dated January 18, 1906, and was acknowledged on the same day. On the 21st day of February, 1906, the said William A. Woodruff and his wife reconveyed the premises by deed to the defendant, Ida Davis. The deed was dated February 21, 1906. It was signed by William A. Woodruff and Sarah Woodruff, and

acknowledged on the same day. These deeds were made without consideration and to convey the land to Ida Davis. It is contended that these conveyances were fraudulent, and that the defendant has had no title to the premises. The residuary legatee makes no claim of this kind. The defendant seems to have paid to the "Swedish Evangelical Mission Covenant in America" the sum of $31 for its interest in the bequest mentioned in the will. The plaintiff and intervener base their alleged title upon the interest of the grandchildren mentioned in the will, and the interest of David Johnson, the testator's son, both of which it is alleged have been conveyed to them. It is shown by the evidence that the bequests mentioned in the will have all been paid by the executrix, and that she settled with the mission society, paying it the sum of $31 for its interest. The plaintiff and the intervener could only receive such an interest from the heirs as they had to convey or transfer, and, it appearing that the defendant paid the bequests made for their benefit, the heirs would not have any thing to convey or transfer, and could not convey or transfer any interest to the plaintiff or intervener. As the heirs were paid the amount of the respective bequests made to them, if there was a fraud practiced it could only have been practiced against the residuary legatee, the "Swedish Evangelical Mission Covenant in America." The society does not complain. It does not appear in the case. It will be seen that the plaintiff and the intervener have no interest in the premises and have never had any interest at any time.

SEDGWICK, J., dissenting.

The majority opinion, in effect, holds that the defendant is entitled to the disputed interest in the land by purchase from the "Swedish Evangelical Mission Covenant in America." The greater part of the opinion is devoted to the question whether that society took anything or was entitled to anything under the will. It was then a serious question whether that society had any interest or

claim against the estate under the will of which she was executrix.

The society made some claims, and while that question was pending the executrix pretended to convey the property to one Woodruff, who immediately reconveyed to her. This had no effect, and the property remained as it was in her hands as executrix. She found that she could buy the unsettled interest of the society for $31. It was worth, if the devise was valid, $4,000, as found by the trial court. If the devise was invalid the interest of the society was worth nothing. To buy it would settle that controversy. There was enough question about the validity of the devise to the society so that it would be the duty of the executrix, in the interest of the estate, to settle the question if she could for $31. As executrix she could not purchase an unsettled claim against the estate for her personal advantage. If she purchased it, it would inure to the benefit of the estate of which she was trustee. It would make no difference whether the claim was for goods sold to decedent or a claim of devise under the will. She could not afterwards say that the claim or devise was valid, and that she was individually the owner of the claim or devise which was of more value than the amount she paid for it.

A court of equity will sometimes adopt the fiction that real estate is converted into personal property. This is done to enable the court to do equity when there is no other way. It has heretofore never been done to enable a fiduciary officer, like an executor or administrator, to settle or purchase a doubtful claim of a pretended creditor or devisee, and so secure for himself the property of the estate which has been in dispute. The discussion as to equitable conversion in this case seems to me to be wholly immaterial.

MORRISSEY, C. J., and FAWCETT, J., concur in this dissent.

JOHN KRUMMACK, ADMINISTRATOR, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 16, 1915. No. 18283.

Railroads: DEATH OF CHILD: ACTIONABLE NEGLIGENCE. "A railroad company * * * is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, *or who may be reasonably expected to be, upon its right of way.*" *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645. And where the evidence shows that the switching-yards of a railway are close to a large public school building and playground, that young children have long been in the habit of playing on or near the cars and tracks, ordinary care demands that in switching cars due regard should be paid to to these conditions, and a failure to enclose the tracks and a neglect on the part of those engaged in switching to observe whether children are on the cars or tracks when a train is being backed in, from the lack of which precautions a trespassing child is injured, may constitute actionable negligence.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

B. P. Waggener, J. A. C. Kennedy and *Yale C. Holland*, for appellant.

Wilmer B. Comstock, contra.

LETTON, J.

Action to recover for the negligent killing of a child. Plaintiff recovered a judgment for the sum of $2,500, and defendant appeals.

The accident occurred in the switching-yards of defendant in the city of Lincoln. The petition charges that for many years there had been situated on T street, immediately east of Ninth street, a public school building, usually attended during the school year by from 300 to 400 children; that a playground equipped with amusement apparatus was maintained upon the school grounds; that the deceased, a boy of the age of seven years, was amusing himself at the playground; that defendant was negligent

in not erecting and maintaining a fence or wall to prevent children from going upon the tracks in the yards, and in not providing a lookout to warn children away from the tracks; that on the day of the accident the defendant had standing on a flat car within 50 to 75 feet of the school grounds some brilliantly painted machinery, which attracted the deceased to the cars upon which the machinery was standing; that he climbed upon the car upon which the machinery stood, and while standing there a long string of cars, without any lookout on the front thereof, was carelessly run against the car on which he stood, after the defendant observed and became aware of his perilous situation, causing him to be thrown from the car and to suffer injuries from which he afterwards died. The answer pleads negligence on the part of the child and on the part of the father, and also pleads that the child was a trespasser.

Thirty-three errors are assigned as to the reception and exclusion of evidence and with respect to certain instructions. We think it unnecessary to consider these in detail. The main contention of defendant is that, since the evidence shows that the deceased was a trespasser in its switching-yards, it was not bound to anticipate his presence, or to use more than ordinary care in the transaction of its business. It is also contended that, owing to the fact that the boy was playing upon the north end of a flat car to which a box car was attached at each end, even if there had been a lookout upon the end of the cars being switched, he could not have seen him. Under ordinary circumstances the first contention states the proper principle of law. We have in a number of cases announced the rules applying to the duty owing by a railroad company to trespassers, and we adhere to the doctrines laid down in *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645; *Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb. 660; *Shults v. Chicago, B. & Q. R. Co.*, 83 Neb. 272, *Wanderholm v. Chicago, B. & Q. R. Co.*, 96 Neb. 764. The testimony in this case, however, establishes a number of facts which we think remove this case from the operation

of the general rule. The switching-yards were just across the street from the school building, which is attended by hundreds of children during the school year. The play apparatus on the school ground was open to the use of the children when school was not in session. The accident occurred shortly after 4 o'clock in the afternoon. Six boys, the oldest of whom was aged 12 years and the youngest, the deceased, who was 7 years of age went to the playground after school to play. After a short time they saw a threshing engine and separator on a flat car on the fourth track and went over to them "to play Cowboy and Indian." The east track in the yard is only 110 feet from the school grounds and is close to the west line of the street. This is the team track, and there is a planked road across this and the next track for express teams to reach the platform. As defendant's tracks extend northward they curve to the east and cross Ninth street between V and W streets. Children frequently played on and about the cars in the yards, although efforts were made by the parents and teachers to keep them away, and balls were often thrown or batted in among the tracks and boys would go after them. This had occurred for so long a time that it must have been within the knowledge of the defendant and its employees.

A witness was passing through the yards between Eighth and Ninth streets near T street. He noticed several boys playing on and about the car upon which the threshing machinery was placed, which stood to the east of him. A switch engine was backing cars on the same track. The side of the engine on which the engineer stands was on the inside of the curve. He saw the cars come together, heard a boy cry, saw several boys running away, at once went to the car, and found a boy on the track underneath. He climbed across the car to the inside of the curve. He then saw the engineer on the engine, and the switch crew scattered along by the side of the cars. One of these men he believes to have been within a couple of car lengths of the flat car when it was struck. None of these men were called by the defendant. According to this testimony

the jury might with reason find that the engineer of the switch engine and the crew, being on the inside of the curve, could, if they had exercised the care which the proximity of the school building and the habits of children in that locality required, have seen the boys in time to prevent the accident. It is true, as defendant contends, that railroad companies are not obliged by statute to enclose their yards within the limits of cities or villages, but the fact that the statute does not make fencing obligatory has no bearing upon the question whether ordinary care and due regard for human life, considering the proximity of such dangerous agencies as moving cars and engines to a place where the presence of children might reasonably be expected, did not demand more vigilance than under other circumstances. What is reasonable care may vary with the circumstances of each case, and the jury were entitled to determine whether or not the defendant was guilty of negligence in failing to enclose its tracks under such conditions, and in failing to take note of the presence of the children on the cars and tracks. There was testimony on behalf of plaintiff to the effect that it was impracticable, with due regard to the necessities of traffic, to fence the team track, but the evidence was not very strong, and the jury were entitled to consider whether it was practicable to fence in all the tracks or to exclude the team track alone.

The evidence sustains the jury in finding there was a lack of reasonable care on the part of defendant and its employees which was the cause of the death of plaintiff's intestate. We are of opinion that the instructions were not prejudicial, and that the defendant did not suffer by the rulings of the court upon the admission of evidence.

The judgment of the district court is therefore

AFFIRMED.

BARNES, J., dissents.

FAWCETT and HAMER, JJ., not sitting.

HOLT COUNTY, APPELLEE; M. T. HIATT ET AL., APPELLANTS, V. HENRY W. TOMLINSON ET AL., APPELLEES.

FILED OCTOBER 16, 1915. No. 19111.

1. **Action: DISMISSAL: ACTION BY TAXPAYER.** In an action by a taxpayer, brought on behalf of a county, in which the county has been made to appear as plaintiff, neither the county nor the county attorney has any absolute right to a dismissal of the case upon motion on the ground that the action was not authorized by them or either of them, since in such actions the county authorities may to some extent occupy an adverse position to the interests of plaintiff and other taxpayers.

2. ———: ———. In an action brought by taxpayers against the individual members of a county board to recover money alleged to have been illegally paid out by them while acting as the board of supervisors of the county, the petition was entitled "The County of Holt, a corporation duly organized under the laws of the State of Nebraska, by M. T. Hiatt and H. M. Uttley, residents of and taxpayers in said county, who bring this action for and in behalf of all the people in the county." A motion by the defendants to dismiss the action and by the county attorney to dismiss "as to the county," for the reasons that the case was brought without authority of the county and the county disclaimed any interest in the suit, was sustained, and judgment of dismissal rendered. *Held*, that the action should not have been dismissed, but that the plaintiffs should have been allowed to proceed, making the county a party defendant, if they so desired.

APPEAL from the district court for Holt county: R. R. DICKSON, JUDGE. *Reversed with directions.*

H. M. Uttley, for appellants.

J. J. Harrington, W. K. Hodgkin and *J. A. Donohoe, contra.*

LETTON, J.

This action was begun against the members of the board of supervisors of the county of Holt, a county under township organization, to recover for the county certain sums alleged to be due for certain penalties provided for by

sections 2461, 6427, Rev. St. 1913. The plaintiff was thus described in the petition: "The County of Holt, a corporation duly organized under the laws of the State of Nebraska, by M. T. Hiatt and H. M. Uttley, residents of and taxpayers in said county, who bring this action for and in behalf of all the people in the county." A motion was filed by the individual defendants to dismiss the action, because it was commenced in the name of the county without the permission or consent of the county attorney, because Messrs. Hiatt and Uttley are not county attorneys of Holt county, and were not employed by the board of supervisors to maintain or bring the action, and have no right or lawful authority to sue or to maintain the action, because the county is not lawfully a party to the action, and because the county attorney has filed a dismissal or demand that the county of Holt be dismissed as a party to the action. The following disclaimer was also filed: "Comes now the county of Holt, by W. K. Hodgkin, its county attorney, and represents that the above-entitled case is brought without authority of law, and the said county of Holt disclaims any interest in the above case, for which reasons the said county of Holt, by its county attorney, hereby dismisses said case as to the county of Holt. County of Holt, by W. K. Hodgkin, County Attorney." The record recites that, upon a motion by the county attorney and the defendants to dismiss the case, the court sustains the motion. The action was then dismissed. Plaintiffs appeal.

Section 2461, Rev. St. 1913, provides that every officer whose salary is in the nature of a per diem shall, before drawing any money, subscribe an oath in a prescribed form, and that any disbursing officer who shall pay any portion of the salary of any such officer before the oath is subscribed "shall forfeit to this state the sum of $50, which forfeiture may be sued for by any taxpayer."

Section 6427, Rev. St. 1913, in substance, provides that the precinct assessor shall not be entitled to compensation until he has filed the lists, schedules, statements, and books appertaining to the assessment of all property for

such year with the county assessor; the schedules to be accurately made and added up, and showing the property assessed listed at its full value. "Any county board, allowing bills of precinct assessors in cases where the provisions of this section have not been complied with, shall be liable on their bonds for amount of same."

It is alleged that in 1914, in violation of this section, the board of supervisors did unlawfully issue warrants to the extent of $3,000 for the payment of assessors.

The appellants cite *Otoe County v. Stroble,* 71 Neb. 415, to the effect that, where by the action of the board of county commissioners a warrant is drawn upon the county treasurer without legal authority so to do, each member of the board voting for the illegal claim is jointly and severally liable to the county, and argues that, if in such a case the county attorney may voluntarily come in and dismiss an action brought by a taxpayer for the benefit of the county, the county would be powerless and must suffer whatever loss an irresponsible board sees fit to inflict upon it. The defendants insist that under section 5596, Rev. St. 1913, the county attorney is the law officer of the county, alone vested with the power to prosecute and defend on behalf of the state and county all suits, applications or motions arising under the laws of the state, in which the state or county is a party or interested, and have cited a number of cases to that effect; but cases where the county authorities have vainly sought to supersede, set aside or ignore the authority of the county attorney are not applicable to the question here presented. We are satisfied that, where an action is properly brought by a taxpayer, the same principles apply as in a case where the county board has allowed a claim against a county, and a taxpayer has appealed from its allowance to the district court. As to a taxpayer's appeal this court has said: "It seems entirely clear that the appeal by the taxpayer contemplated by the legislator was one, to a certain extent, or entirely, antagonistic to the claimant and the county by reason of being aggrieved by the action of the latter in the allowance of the claim. The county is a party to the suit

after its appeal, but cannot by any action therein, by way of admission of the claim in whole or in part, rob the appeal of its significance, or rather deprive the appellant of the right to a hearing of the appeal. If it could, then the provision for an appeal by the taxpayer would be but meaningless words, and the appeal a useless and empty proceeding." *Gage County v. King Bridge Co.*, 58 Neb. 827, 837. To permit a taxpayer to bring an action against the individual members of a county board for dereliction of duty and at the same time allow that body, or the county attorney, to dismiss the proceedings would be folly. We are not compelled to adopt such an unreasonable view of the law.

The question remains, then, had the appellants the right to bring this action in the name of the county? In *Walker v. Village of Dillonvale*, 82 Ohio St. 137, 19 Am. & Eng. Ann. Cas. 773, the action was brought in the name of the "Village of Dillonvale, on relation of Thomas McCabe, against Harry Walker, William S. Parlett, William Lappin, George King, Asa Hooper, and Oliver L. Guyton, as individuals and as councilmen of the village." The petition alleged that the relator was a taxpayer, and that the defendants were councilmen of the village, that they had illegally issued to each of themselves a voucher for $48, which had been paid by the village treasurer. He prayed for a judgment for and in behalf of the village against the defendants and each of them for the entire amount paid. A demurrer was filed on the ground that the plaintiff had not legal capacity to sue. The court held that the case did not fall within the terms of certain statutes regulating actions in the name of the corporation, by the city solicitor or a taxpayer, to restrain the abuse of corporate powers by city officials, and said: "The fact that the suit in the present case is in the name of the village on relation of the taxpayer instead of in the name of the taxpayer for the use of the village, or on behalf of all the taxpayers of the village, has not in it sufficient merit to require a denial of relief, but the court may treat the action as one in the name of the taxpayer on behalf of

the village. It follows that the taxpayer is not without legal capacity to sue."

In this case the motion by the county attorney on behalf of the county was merely that the action should be dismissed "as to the county." The court went further and dismissed the suit *in toto*. The mere fact that the name of the county was used in the title did not warrant the dismissal of the action. The court should have treated the action as an ordinary taxpayer's suit in behalf of the county. Ordinarily in such actions, as in the suit of a stockholder in a private corporation, the petition should allege the refusal of the county authorities to act; but, under such facts as are alleged in this case, it would be unreasonable to believe that the officials would take action against themselves, and demand is unnecessary. *Jackson v. Norris,* 72 Ill. 364; *Gillespie v. Gibbs,* 147 Ala. 449; *Mock v. Santa Rosa,* 126 Cal. 330; *State v. Weld,* 39 Minn. 426; Note to *Slavin v. McGuire* (205 N. Y. 84) in Am. Ann. Cas. 1913C, p. 881. As to the county attorney, the petition recites that he has declined to prosecute the action. Other questions are suggested in the briefs, but they are not raised by the motion. The only issue presented is whether the district court erred in sustaining the motions to dismiss. We express no opinion upon any other point in the case.

The judgment of the district court is reversed and the cause remanded, with directions to overrule the motion to dismiss the case, and to permit appellants to amend the title of the case, and make the county a party defendant, if they so desire; if they fail to amend within a reasonable time, to dismiss the action at their costs.

REVERSED.

SEDGWICK, J., concurs in reversing the judgment of the district court.

HAMER, J., not sitting.

HOLT COUNTY, APPELLEE; M. T. HIATT ET AL., APPELLANTS, V. BOARD OF SUPERVISORS ET AL., APPELLEES.

FILED OCTOBER 16, 1915. No. 19112.

APPEAL from the district court for Holt county: R. R. DICKSON, JUDGE. *Reversed with directions.*

H. M. Uttley, for appellants.

J. J. Harrington, W. K. Hodgkin and *J. A. Donohoe, contra.*

LETTON, J.

This action is similar in its facts to *Holt County v. Tomlinson, ante,* p. 777, although the defendants comprising the members of the board of supervisors are not identically the same persons as the defendants in the former suit, and the alleged violations of duty are not the same. In this case no appearance had been made by the defendants when the county attorney on behalf of the county moved that it should be dismissed from the action as party plaintiff. In this case, also, the court dismissed the entire action.

For the reasons stated in the opinion in the former case, the judgment of the district court is reversed and the cause remanded, with directions to sustain the motion so far as to dismiss the county as a party plaintiff, but to allow the action to proceed in the name of M. T. Hiatt and H. M. Uttley, if they so desire.

REVERSED.

HAMER, J., not sitting.

JOHN W. WALTERS, APPELLEE, V. CHICAGO GREAT WESTERN RAILROAD COMPANY ET AL., APPELLANTS.

FILED OCTOBER 16, 1915. No. 18306.

1. **Master and Servant:** INJURY TO SERVANT: ASSUMPTION OF RISKS. A servant assumes the ordinary risks and dangers incident to his employment, which he knows or which by the exercise of ordinary care a person of his age, experience and capacity, under the circumstances, should have known.
2. ———: ———: ACTIONABLE NEGLIGENCE. An employer's direction to an employee to hurry is not actionable negligence, where it does not tend to subject him to a hazard not ordinarily incident to his employment, or to inspire fear, or to confuse, excite or distract him, or otherwise to prevent him from exercising ordinary care for his own safety.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Reversed with directions.*

W. D. *McHugh, W. H. Herdman* and *Smyth, Smith & Schall,* for appellants.

J. W. Woodrough and *McLaughlin & Neely, contra.*

ROSE, J.

Plaintiff fell on the floor of a railway freight car, while unloading wall-paper, and this is an action to recover resulting damages in the sum of $15,000 for personal injuries. At the time of the accident the car stood on a siding in the Omaha freight yards of the Chicago Great Western Railroad Company. It is charged that the carrier negligently delivered the consignment of wall-paper in a box car with a loose, sliding door, through which snow filtered, thus making the floor slippery and dangerous. Plaintiff was in the employ of the consignee, Yetter & Company, a corporation, and he alleges that his employer negligently ordered him, without warning, to hurry into the car, when he had no knowledge of his peril. The carrier and the employer are defendants. Both denied negligence, and al-

leged that plaintiff had assumed the risks of his employment. The jury rendered a verdict in favor of plaintiff and against both defendants for $7,500. The latter appealed. After the appeal had been docketed, plaintiff confessed that the judgment against the Chicago Great Western Railroad Company was erroneous, and in that respect it was reversed. The remaining controversy here is between plaintiff and his employer, Yetter & Company.

The decisive point on appeal is the sufficiency of the evidence to sustain the verdict. The judgment rests on the testimony of plaintiff. It may be summarized as follows: He was employed March 12, 1912, by Yetter & Company, and worked under the direction of Merwin E. Vernon, foreman. The car of wall-paper was delivered to that corporation by the Chicago Great Western Railroad Company. It stood on a side-track running east and west in the carrier's Omaha freight yards ready to be unloaded at a door on the south side. Before noon, March 13, 1912, the foreman, accompanied by plaintiff, backed a dray up to the car door; the floor of the dray being practically on the same level as that of the floor of the car. The door did not fit closely, and between it and the rolls of wall-paper, which had been loaded with the ends to the door, snow had collected. Plaintiff swept out the snow. The wall-paper had been packed in bales, each weighing 25 pounds or more, plaintiff and the foreman carrying them from the car to the dray. Together they delivered a dray load at the employer's warehouse in Omaha. They spent the afternoon at work in the same manner, and closed the car for the night. They took a dray load from the car to the warehouse before noon the next day, and closed the car door. When they returned to work in the afternoon there was no snow in the car, the floor of which was covered with a thick, heavy, glazed paper with a sleek surface. Up to that time plaintiff could walk in the car as well as on the floor of the court-room. After the wall-paper had all been moved from the car except one dray load, and while plaintiff and the foreman were absent from the closed car on a trip to the warehouse, snow fell, with the wind in the

southeast. They returned for the last dray load about 5 o'clock. In their absence the wind sifted snow into the car at the lower west corner of the closed door and deposited it on the floor in a northwesterly direction. While plaintiff was adjusting a tarpaulin in the front end of the dray the foreman opened the car door. Plaintiff was told to hurry to avoid the expense of demurrage. He hastened into the car after the foreman, and what followed is stated by him in these words: "I walked to the west end of the car and got a bundle of paper, and I had it and carried it into the wagon and placed it in the front end, and as I came back and turned the corner away from the door towards the west end my feet slipped out from under me and I fell and received an injury to my hip and thigh." He further testified that it was about 5 o'clock when he slipped and fell; that the day was cloudy; that he did not see the snow in the car or know it was there until after he had fallen; that when he first stepped into the car he could see the outlines of the bundles in the west end.

The substance of the argument justifying the inference of actionable negligence on the part of the employer appears in the brief of counsel as follows: "The circumstances under which plaintiff was injured demonstrate conclusively that his falling upon the snow in the dark car was not his fault. It was the fault of the boss who ordered him to hasten into the car without in anywise calling his attention to the dangerous condition which had been created in the car during plaintiff's absence. The danger of this condition was obvious to Vernon when he was getting the door of the car open and before he gave his reckless order to the plaintiff to hurry into it. There is no shadow of doubt but that plaintiff owes his injuries entirely to this reckless and careless order given him by Vernon."

Is the position thus taken tenable? Plaintiff was an able-bodied man of mature years and of at least ordinary intelligence. There is nothing in the record to indicate that he was handicapped by any mental or physical infirm-

ity. In determining the employer's duty to plaintiff, therefore, the latter is chargeable with what he actually knew of existing conditions, as well as with what he could have observed by the exercise of ordinary care for his own safety under the circumstances, unless his employer misled or neglected him to his injury. The situation under which plaintiff performed his duties was very simple. He knew the condition of the floor, in the absence of snow, because he had seen it and had walked in and out of the car many times. He knew the car would not keep the snow out, because he had swept snow out of it. He knew snow had fallen during his absence, because he was out in it and had brought and adjusted a tarpaulin to protect the wall-paper when loaded into the dray. He knew the wind was blowing from the southeast and its effect upon falling snow. Though he testified he did not know there was snow in the car, should he, in the exercise of ordinary care, under the circumstances, have known it? According to the undisputed evidence the accident occurred more than an hour before sunset. The door of the car was open at the time, and he fell about 18 inches from the entrance. The color of the paper on the floor was brown, and the white snow upon it was obviously conspicuous by contrast. The line of snow which had sifted into the car commenced at the lower west corner of the open doorway. In the west end of the car, where it was darker, plaintiff could see the outlines of the bales of wall-paper. With the conditions as thus described, plaintiff, without mishap, had already gone into the west end of the car and had taken out a bundle of paper. His means of observation were the same as those of the foreman, unless the latter was negligent or misled him in some respect. Was the order to hurry negligent, under the circumstances? It was not given at the time of, or immediately before, the accident. It was given when both men were in the dray. In the meantime both had gone into the car and had returned to the dray in safety. There is nothing to indicate that plaintiff was confused or excited by the direction to hurry, or that he was seized by

a fear of losing his position, or that he was prevented from exercising ordinary care for his own safety.

In discussing the effect of directing a servant to hurry, the court of appeals of Missouri said: "Now, as a general proposition, the master, the superior servant, or vice-principal, may give such usual and customary orders in and about the business he is prosecuting and within the scope of the employment as are essential to induce a prompt and attentive discharge of the duties imposed by the contract of service without breaching the obligation to exercise ordinary care for the safety of the servant. A mere order to hurry or to be quick in the performance of labor in and of itself is not negligence. Such, generally speaking, is a usual and proper exercise of authority. *Coyne v. Union Pacific R. Co.*, 133 U. S. 370; *Ruchinsky v. French*, 168 Mass. 68; *Herold v. Pfister*, 92 Wis. 417. Indeed, on this question the authorities go to the effect that a mere order to hurry up with the task is not negligence unless it tends to subject the party to an extraordinary hazard; that is, a hazard not ordinarily incident to the employment, or operates to excite, distract or disconcert the employee to such an extent as renders him unable to exercise due care for his own safety. *Sambos v. Cleveland, C., C. & St. L. R. Co.*, 134 Mo. App. 460, 467; *Saller v. Friedman Bros. Shoe Co.*, 130 Mo. App. 712." *English v. Roberts, Johnson & Rand Shoe Co.*, 145 Mo. App. 439.

In the present case there is nothing in the evidence to indicate that the foreman had any reason to suspect plaintiff would not see the snow on the glazed surface of the floor or fail to use ordinary care to avoid injury. Since the conditions resulting in the accident were open and obvious, since they were brought about by the operation of familiar natural laws, of which plaintiff was required to take notice, since there was no duty on the part of the employer to give warning of the danger, since the plaintiff was not misled or neglected by his employer, since the undisputed evidence shows that the exercise of ordinary care on the part of plaintiff, under the circumstances, would have re-

sulted in his observing existing conditions and danger, he will not be permitted to establish actionable negligence on the part of his employer by testifying that he did not see the dangerous condition, but that his employer did and failed to warn him of it.

A text-writer said: "There are, it may be supposed, very few trials in which the servant does not swear that the risk was unknown to him. Due weight is attached to this consideration; for, taking the cases as they stand, it seems permissible to say that such a denial is treated as being a merely corroborative element which furnishes an additional justification for a conclusion in itself not unwarrantable even if that element were abstracted. * * * Both on principle and authority it is indisputable that, if the servant's testimony is contrary to all probability when the rest of the evidence is considered, it may be disregarded by a court of review." 4 Labatt, Master & Servant (2d ed.) sec. 1309.

While plaintiff's injuries and resulting condition appeal to human sympathies, the judgment in his favor is without support in the evidence. It is therefore reversed, with a direction to the trial court to dismiss the action.

REVERSED.

FAWCETT and HAMER, JJ., not sitting.

IN RE ESTATE OF SARAH A. GETCHELL.
FRANK CARRIER, APPELLEE, V. MELVIN GETCHELL, APPELLANT.

FILED OCTOBER 16, 1915. No. 18960.

1. **Appeal: TIME.** The time for taking an appeal from the district court to the supreme court begins to run when the final judgment is entered of record.
2. **———: VERITY OF TRANSCRIPT.** On appeal the duly authenticated transcript of the proceedings of the trial court imports verity.
3. **———: ———: DATE OF JUDGMENT.** On appeal to the supreme court the date of the judgment of the district court, as shown by

the journal entry appearing in the duly certified transcript, cannot be contradicted by a detached certificate of the clerk.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Motion to dismiss appeal. Hearing continued.*

J. F. Boyd, for appellant.

A. R. Oleson, contra.

ROSE, J.

This is a motion by plaintiff to dismiss an appeal by defendant on the ground that the transcript of the proceedings in the district court for Cuming county was not filed here within the statutory period of six months from the rendition of the judgment below. Rev. St. 1913, sec. 8203. The time for taking an appeal begins to run when the judgment is entered of record. *Bickel v. Dutcher,* 35 Neb. 761; *Hall v. Moore,* 3 Neb. (Unof.) 574; *Morrison v. Gosnell,* 76 Neb. 539. The duly authenticated transcript in the present case shows that the final judgment was entered of record June 3, 1914. The appeal was docketed here December 4, 1914—one day too late. To prevent a dismissal defendant presents a separate certificate of the clerk of the district court containing the following recitals:

"While the transcript of proceedings had in the district court of Cuming county, Nebraska, in the above entitled cause, shows that the journal entry of the judgment rendered on the 3d day of June, 1914, in said cause was filed in the office of the clerk of the district court in said county of Cuming, state of Nebraska, on said 3d day of June, 1914, yet, said journal entry was not in fact filed in the office of said clerk of the district court, or entered upon the journal of said court, until a few days after said 3d day of June, 1914."

The authentic record of the trial court cannot be thus contradicted. The duly certified transcript imports verity. *Hoagland v. Van Etten,* 23 Neb. 462. It cannot be varied

by the detached certificate of the clerk. *Hunter v. Hunter,* 88 Neb. 153.

In the case of *Morrison v. Gosnell,* 76 Neb. 539, the supplemental certificate of the clerk was considered, but the opinion does not disclose that the transcript showed the date on which the judgment was entered on the journal. In this respect the cases are distinguishable.

Further hearing on motion to dismiss the appeal is continued, with leave to appellant to make application to the district court to correct the journal entry, if incorrect.

HEARING CONTINUED.

JOHN J. KOLIHA, APPELLEE, V. BERNARD JONAS, APPELLANT.

FILED OCTOBER 16, 1915. No. 18311.

Brokers: ACTION FOR COMMISSION. *Bell v. Stedman,* 88 Neb. 625, reaffirmed, and *held* decisive of the case at bar.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

F. Dolezal and *W. I. Allen,* for appellant.

Myron L. Learned and *Joseph T. Votava, contra.*

FAWCETT, J.

Defendant entered into a written agreement with plaintiff, who was a real estate agent, in which he authorized plaintiff to sell a valuable tract of land for $19,200, and agreed to furnish "a merchantable abstract showing clear title to the purchaser and give good and sufficient warranty deed." The contract recited that for his services in negotiating the sale he would pay to plaintiff a commission of $200 and all excess of the selling price named when sale of the property was made. The agent negotiated a sale for $20,400, and defendant entered into a written contract with the purchaser for the sale of the property at

the price named and upon terms of payment set out in the contract, and agreed "to furnish a warranty deed on March 1, 1910, a good and sufficient abstract of title," etc. The purchaser was ready, willing and able at all times to carry out his contract, make the payments agreed upon, and take the title to the property; but defendant's wife refused to sign the deed of conveyance and the actual transfer of the land was never consummated. From a verdict and judgment for plaintiff for the full amount of the agreed compensation, defendant appeals.

The gist of the argument for reversal is that the purchaser had a right to decline to accept a deed from defendant alone. Upon this point there can be no disagreement. The next point is that, as defendant's wife had not agreed to a conveyance, either verbally or in writing, she could not be compelled to join in the deed. Again there can be no disagreement. The third point is: "There being no sale, no commission." We deem it unnecessary to consider the argument of counsel in support of this contention, for the reason that every point he makes is fully answered and decided adversely to his contention in *Bell v. Stedman*, 88 Neb. 625. That case is decisive of this.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

JAMES O. BAKER ET AL., APPELLANTS, V. MORRILL DRAINAGE DISTRICT, APPELLEE.

FILED OCTOBER 16, 1915. No. 18473.

1. **Drains: DRAINAGE DISTRICT: APPORTIONMENT OF BENEFITS.** The record examined and set out in the opinion, *held* sufficient to show that the board of directors of defendant drainage district, on March 22, 1913, made an apportionment of benefits to the lands in said district and duly published the same.

2. ———: ———: ———: **OBJECTION: WAIVER.** And appellants, having appeared at such meeting of the board and made objection to the assessment of benefits against their lands, by prosecuting an

appeal from such assessment to the district court, waived their right to insist in said court that no apportionment of benefits had in fact been made.

3. ———: ———: ———: APPEAL: SUFFICIENCY OF EVIDENCE. Where it appears that the directors of a drainage district, before apportioning benefits to the lands within such district, went upon each parcel of land and carefully inspected the same, and that the judge of the district court, on the hearing of an appeal from the action of the board, also went upon and inspected the lands, and, after doing so, affirmed the action of the board, these facts, in the absence of satisfactory evidence of fraud or mistake, will be held sufficient to sustain the findings and judgment of the trial court.

APPEAL from the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Affirmed.*

L. L. Raymond, for appellants.

William Morrow, contra.

FAWCETT, J.

This is an appeal by 12 landowners from a judgment of the district court for Scott's Bluff county, sustaining an apportionment of benefits to their several tracts of land, as made by the board of directors of the defendant drainage district on March 22, 1913. Five errors are assigned in appellants' brief, but only two are presented in the argument. These we will consider in their order.

"First. No apportionment of benefits was in fact ever made to appellants' lands, or any lands in said district." In support of this assignment it is urged that the record of the meeting of the board of directors, at which the apportionment of benefits was made, is insufficient to show that any assessment was actually made. The record shows a meeting of the board held March 22, 1913, at which four directors were present. It shows objections made to assessment of benefits by the parties who are appellants here, and the overruling of the same. The transcript of the proceedings of the board of directors of defendant district, filed in the district court, and a part of the record before us, gives in detail the lands assessed, the total units,

and amount of assessment. It contains this caption: "Detailed Report of the Apportionment of Benefits. Made by the Board of Directors of the Morrill Drainage District. Made and completed on the 22d day of March, A. D. 1913." To this is attached the certificate of the secretary of the board, certifying "that the above and foregoing assessment of benefits was levied by said board upon the lands, lots and parcels of land above described." This certificate is dated March 22, 1913. Conceding that the proceedings of the board, or, to speak more accurately, the record made by the board of its proceedings, may not have been in all respects regular, the appellants are not in a position to claim that no apportionment of benefits was ever made. If that allegation be true, what did they appeal from? They appeared before the board and made their objections. When those objections were overruled, they appealed to the district court. In so doing, they waived any right to insist that no apportionment of benefits had been made. It certainly would be a unique procedure for them to go to the district court and say in one breath that they appeal from an apportionment of benefits made by the drainage district, and in the next breath tell the court that the drainage district had not made any assessment. By their appeal they submitted their cause to the court and invoked its aid in reviewing the apportionment which had been made. They thereby asked the court to take evidence, investigate the facts, and determine whether their assessment was unjust or inequitable. The only question, therefore, which we can consider is, the sufficiency of the evidence to sustain the finding of the district court.

This brings us to the second assignment urged, viz.: "Appellants' lands will not be benefited by the proposed drainage works." The two principal contentions of the appellants are: First, that certain of their lands have not been drained and other portions do not need draining. This, however, is not the sole test of benefits. As said in *Dodge County v. Acom,* 61 Neb. 376: "In determining special benefits accruing to land by reason of the construction of a drainage ditch, it is proper to take into consid-

eration whatever will come to the land from the drain to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, the true and final test being what will be the influence of the proposed improvement on the market value of the property." The opinion in that case, on page 388, quotes from *Culbertson v. Knight,* 152 Ind. 121, as follows: "Public health, public convenience, and public utility are fundamental considerations, and these, with all other subjects that affect the value of land, must be counted upon by the viewers in determining the question of benefits. A rule that has received high sanction is stated thus: 'The only safe and practical course—the one which will do equal justice to all parties—is to consider what will be the influence of the proposed improvement on the market value of the property.' (Citing authorities.) Whatever will come to the land from the drain to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, should be reckoned as benefits, and these questions arise without reference to whether the drain actually reaches the land and receives the water directly from it."

Second, that Mr. Stewart, one of the appellants, has completed a drainage ditch that has served the purpose of draining all, or a portion at least, of the lands in controversy, and for that reason the construction of another ditch would not benefit his lands. The testimony of Mr. Stewart shows that at the time defendant drainage district was organized all he had done with reference to his ditch was the making of a survey; that he did not do any work until the spring of 1912, which was after the organization of the drainage district. We are unable to see how this work, done by Mr. Stewart at a time when he knew the defendant drainage district had been organized for the express purpose of doing that same work, and along the same proposed route, can now be urged by him and his coappellants in reduction of their assessments. While it would be the equitable thing for the defendant in completing its work to take over this ditch, if it is in fact along the line

of its survey and would be of benefit to the district, and reimburse Mr. Stewart to the extent that the work done by him has lessened its expense in completing its scheme of drainage, such action on the part of the defendant cannot be legally compelled.

Without pursuing the subject further, it appears from the record that the directors of the drainage board went upon each parcel of land and carefully inspected the same before making their apportionment of benefits. The record also shows that the learned judge who tried the case on appeal also went upon and inspected the lands, and, after doing so, affirmed the action of the drainage board. These facts tend strongly to show that the apportionment was fairly and justly made. We have found nothing in the record to satisfy us that such is not the fact.

The judgment of the district court is therefore

AFFIRMED.

HAMER, J., not sitting.

JAMES O. BAKER ET AL., APPELLANTS, V. JOHN T. LOGAN ET AL., APPELLEES.

FILED OCTOBER 16, 1915. No. 18906.

1. **Drains: DRAINAGE DISTRICT: APPORTIONMENT OF BENEFITS.** Paragraphs 1 and 2 of the syllabus in *Baker v. Morrill Drainage District*, *ante*, p. 791, *held* applicable to and decisive of points 1 and 2 considered in this case.

2. ———: ———: ———: **INJUNCTION: LACHES.** The laches of plaintiffs, set out in the opinion, examined, and *held* a bar to relief by injunction.

APPEAL from the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Affirmed.*

L. L. Raymond, for appellants.

Morrow & Morrow, contra.

FAWCETT, J.

Plaintiffs, who are owners of lands and lots situated within the Morrill Drainage District in Scott's Bluff county, brought this suit against the defendants as directors and secretary, respectively, of the drainage district, to enjoin them from issuing or selling any securities based upon any apportionment of benefits attempted to be made on March 22, 1913, to property located within the district, and from issuing any bonds, warrants or other securities pledging the faith and credit of the district in carrying out the terms of an alleged illegal and void contract, entered into by the district with the United States government, and praying that such contract be declared illegal and void, and that defendants be enjoined from executing or carrying out any of the terms of said contract or from expending any moneys of the district in the carrying out or execution of the same, and that defendants be enjoined from apportioning any benefits to or levying or collecting any taxes or special assessments against the lands of the plaintiffs for the benefit of the district. The court found generally for the defendants, dissolved the temporary injunction, which had been theretofore issued, and dismissed the suit at the costs of plaintiffs. Plaintiffs appeal.

Three points are urged for reversal: (1) That the apportionment on March 22, 1913, was a reapportionment, and that notice of hearing on such reapportionment had not been given in the manner and for the time required by law; (2) that, as a matter of fact, no apportionment of benefits or levy was actually made on March 22; and (3) that a certain contract, made by the district with the United States Reclamation Service October 29, 1912, was *ultra vires*.

The argument in support of the first point is that notice was not published for ten days, as required by section 5636*x4*, Ann. St. 1911. It is contended, in opposition to the argument of plaintiffs, that the apportionment made March 22, 1913, was an original apportionment, and not a reapportionment. This contention is sound.

As to point 2, we deem it sufficient to say that the evidence in this case is substantially identical with that given in support of the same contention, in *Baker v. Morrill Drainage District, ante,* p. 791. We considered the contention of plaintiffs carefully in that case, and, for the reasons there given, point 2 must fail in this case.

Point 3 relates to a contract which had been entered into between the drainage district and the United States through its duly constituted officers of the United States Reclamation Service. This contract provided that, for a consideration of $7,500, to be paid by the United States to the drainage district, the drainage district was to construct and complete the ditch in accordance with plans and specifications, approved by the proper officers of the United States Reclamation Service; described the lands in which the United States is directly interested, dividing them into what they termed the "west system" and the "east system;" provided that the drainage district should procure the right of way for the government portions of the work before payment of the money should be made, which right of way should be 50 feet in width; that the United States should have the use of the ditches for a waterway for the conveyance of waters drained thereto from its main canal or other works of its project, "limited, however, to the carrying capacity of such ditches in excess of that necessary for the conducting of seepage and drainage water arising within the district;" that the United States might use such ditches for drainage and waterways.

The writer has examined the contract in the light of the points urged, and is of opinion that its terms are within the provisions of section 1893, Rev. St. 1913, and that the contract is not *ultra vires,* but will not take the time and use the space necessary to a discussion of that question, for the reason that the plea of estoppel, interposed by the defendants, is well sustained and disposes of the appeal. On the trial below, the facts upon which the estoppel is based were stipulated. This stipulation admits the meeting of the board of directors of the district on

March 22, 1913; that all of the plaintiffs, except plaintiff Bullock, appeared before the board and protested against any assessment being made; that thereafter the secretary of the board caused a detailed report of the assessment of benefits to be published, and also filed a detailed report of the apportionment of benefits with the county clerk of the county on March 24, 1913; that *all* of the plaintiffs appealed from that assessment to the district court. It further admits that on August 7, 1912, the directors of the drainage district prepared plans and specifications and an estimate of the work to be done thereunder; that the same was adopted by the board on that date, and on the same day filed with the county clerk of the county; that thereupon the board called an election and submitted to the electors of the district the proposition of proceeding with the work defined and described in the plans and specifications, and the question of incurring the necessary liability to carry on such work; that notice of the election was published and the election held on September 10, 1912, the day named in the notice. A copy of the published notice is contained in the stipulation and shows that it contained this information: "The estimated cost of the construction of said works is $20,038.55, $7,500 of which amount is to be paid by the United States government, leaving a balance of $12,538.55, to be paid by said drainage district." It also advised the voters that to raise the amount it was proposed to issue the bonds of the district due and payable in 20 annual instalments, with interest at the rate of 6 per cent. per annum. The stipulation also admits that at that election the result was, yes, 3,564; no, 3,025; "that thereafter, on the 14th day of November, 1912, a contract for the construction of the west drain was let to J. E. Mullen for the sum of $6,185.25, and said west drain was constructed and completed in accordance with the terms of said contract some time during the month of June, 1913, and said drain has been in operation since said date. It is further stipulated that all of the plaintiffs in this case voted at said election held on September 10, 1912, and voted against the proposition of proceeding with the

work and incurring the necessary liability." This suit was not commenced until November 3, 1913, or 14 months after the election authorizing the board to proceed with the plans and specifications theretofore adopted, in accordance with such plans, and in accordance with its contract with the United States—twelve months after the defendants had entered into the contract with Mr. Mullen for the construction of the west drain, and five months after Mr. Mullen had completed his work under the contract. The rule to be applied under such circumstances is well stated in 16 Cyc. 163, as follows: "Equity is equally careful to avoid injustice to third persons as to parties, and therefore will deny for laches the claim of one who has slept on his rights until third persons have acquired rights which would be affected by granting him relief." Applying that rule, it appears that, not only the rights acquired by the United States Reclamation Service, but also the rights acquired by Mr. Mullen to obtain payment for the large amount of work he has performed in constructing one of the important ditches of the defendant district, would be seriously affected, and in effect lost, if the relief prayed for in this suit were granted.

It follows that the district court did not err in denying an injunction and dismissing the suit of plaintiffs.

AFFIRMED.

HAMER, J., not sitting.

IN RE ESTATE OF JOHN JOHNSON.
JULIA JOHNSON, EXECUTRIX, APPELLANT.

FILED OCTOBER 16, 1915. No. 19391.

1. **Wills: PROBATE: NOTICE: PUBLICATION.** Under the legislative construction of the term "week," in chapter 222, Laws 1915, the publication of notice of the time and place appointed for the proving of a will, as required by section 1303, Rev. St. 1913, begins with the date of the first publication, and the three weeks do not end until three weeks from and after that date. A hearing had prior to the com-

pletion of such notice is premature and an order entered thereon at such hearing is void.

2. **Statutes: DEFINITIVE STATUTE: PUBLICATION OF NOTICE: "WEEK."** The construction by the legislature, in chapter 222, Laws 1915, of the term "week," superseded the construction given to such term in *Davis v. Huston*, 15 Neb. 28, *Claypool v. Robb*, 90 Neb. 193, and other cases decided prior to the passage and approval of such chapter, in so far as such cases conflict therewith.

3. ———: ———: ———: ———. Chapter 222, Laws 1915, set out in the opinion, examined, and *held*, not an attempt by the legislature to either repeal or amend any prior statute, but simply a legislative construction of the word "week" as used in the statutes in reference to the publication of legal notices.

APPEAL from the district court for York county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Sandall & Wray, for appellant.

FAWCETT, J.

John Johnson, a resident of York county, died testate. His will was filed for probate August 27, 1915. On that date the probate court entered an order fixing September 17 as the time for hearing the petition for the probate of the will, and ordered that public notice of such hearing be given by publication of notice in the New Teller, a weekly local newspaper, published in the county, "three weeks successively previous to said day of hearing." The notice was published September 1, 8, and 15. On the day named in the notice, viz., September 17, the following transactions were had, in the order named: The will was admitted to probate; Julia Johnson, widow of the testator, was appointed executrix; her bond was filed and approved and letters testamentary were issued to her; a petition was filed by Joseph Johnson, a son and heir of the decedent, to set aside the probate of the will; his petition was sustained, and the order admitting the will to probate was vacated and set aside and the letters testamentary issued to Mrs. Johnson revoked, on the ground that the only notice given of the application to probate the will was the notice published in the newspaper and upon the dates above

named; notice of appeal to the district court for York county was filed, and the county judge delivered to the clerk of the district court a duly certified transcript of the proceedings had before him. Five days later the order of the county court was affirmed by the district court. From this order Mrs. Johnson appeals.

It will be seen from the history of the case above given that this is a friendly proceeding prosecuted for the purpose of obtaining a construction of section 1303, Rev. St. 1913, in the light of the general construction by the legislature, in chapter 222, Laws 1915, of all statutes of the state which provide for the publication of notices for any number of weeks. The statute relating to the notice to be given of an application for the probate of a will was first enacted in territorial days, and will be found in Rev. St. 1866, ch. 14, sec. 140, p. 85, in exactly the same language as it now appears in section 1303, Rev. St. 1913, viz.: "When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, and shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of such court, in such newspaper printed in this state as the judge shall direct, three weeks successively, previous to the time appointed, and no will shall be proved until notice shall be given as herein provided."

In *Davis v. Huston,* 15 Neb. 28, in construing the provisions of a statute requiring the publication of notice to nonresident defendants to be made four consecutive weeks in some newspaper, such provisions were held to mean "the same as though the language were that it should be printed or inserted in a weekly newspaper once in each week for four weeks successively, and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive weekly insertion. The paper will be presumed to have been published on the day of which it

bears date." In all cases involving the provisions of a statute requiring publication of notice for any given number of weeks, the construction above given has been followed where publication was made in a weekly newspaper.

In *Claypool v. Robb,* 90 Neb. 193, *Davis v. Huston, supra,* was followed as to a weekly newspaper, but a different rule was announced when a notice is published in a newspaper having more than one issue during the week. The second paragraph of the syllabus in that case holds: "But, where the notice is published in a paper having more than one issue during the week, insertion of the notice in each of the regular issues during the week is necessary to a complete publication of the notice for that particular week." Under the construction there given, it will be seen that there might, and almost invariably would, occur a difference in the length of time a notice should be published in a weekly newspaper, or in a semi-weekly or daily newspaper. *Claypool v. Robb* was decided November 14, 1911, and was followed on the 28th of the same month by *Smith v. Potter,* 90 Neb. 298.

The legislature of 1915, for the purpose of bringing about uniformity in the construction of statutes of this character, enacted chapter 222, Laws 1915, *supra.* The title to the act reads: "An act to define the word 'week' as used in the statutes of Nebraska in reference to the publication of legal notices, and to declare an emergency." Section 1 provides: "Wherever the statutes of Nebraska provide for the publication of notices any number of weeks, or for any number of weeks, the term 'week' shall be construed to mean either a period of time known as a calendar week beginning on Sunday and ending with Saturday, or any period of seven consecutive days beginning with the date of the first publication of notice: Provided, however, nothing herein contained shall be held to apply to any notice published prior to the taking effect of this act." Section 2 declared that an emergency existed, and that the act should take effect and be in force from and after its passage and approval. It was approved April 17, 1915. We think this act of the legislature is clear and unmistaka-

ble in its terms and relieves the situation of all doubt as to the construction which must be given to statutes of the kind therein referred to, and that section 1303, Rev. St. 1913, is clearly one of the statutes contemplated. Under this construction, put upon the statute by the legislature, we think it is clear that a notice by publication either "during" or "for" any number of weeks, whether the same be in a weekly, semiweekly, triweekly, or daily newspaper, should be for the full number of weeks specified in the statute, and that the time for computing such publication should in any case begin with the date of the first publication of the notice. This being true, the publication of the notice required by section 1303, *supra,* begins with the date of the first publication, and the three weeks do not end until three weeks from and after that date, excluding under the general rule of computation the first day, which, in the present case, the first notice having been published on September 1, would render the hearing premature if had prior to September 22. As section 1303 further provides that "no will shall be proved until notice shall be given as herein provided," the order of probate entered September 17 was without authority of law and was properly vacated.

It has been suggested that the construction above given might have the effect to cloud titles which depend upon wills probated under notices published prior to the enactment of chapter 222, *supra*; but the legislature in that chapter itself guarded against any such contingency by providing that "nothing herein contained shall be held to apply to any notice published prior to the taking effect of this act."

Appellant further urges that, if it was the intention of the legislature of 1915 to repeal section 1303, then chapter 222, *supra,* violates section 11, art. III of the Constitution, which provides: "No law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." The trouble with this contention is that it has no fact to rest upon. Chapter 222, *supra,* does not assume to either re-

peal or amend section 1303, or any other section of the statute. It is simply a legislative construction of the word "week" as used in the statutes in reference to the publication of legal notices.

AFFIRMED.

HAMER, J., not sitting.

CHARLES J. DEUPREE, APPELLEE, V. SIDNEY D. THORNTON, JR., ET AL., APPELLANTS.*

FILED OCTOBER 16, 1915. No. 17942.

1. **Conspiracy: PROOF.** To sign and circulate a statement which would be libelous if untrue, but which is in fact true, is not of itself, and without other evidence, sufficient proof to establish a conspiracy, on the part of those signing it, to injure the party to whom it relates, and if published with good motives and for justifiable ends is not even libelous.
2. ———: EVIDENCE: SUFFICIENCY. The evidence in this case shows that the general reputatation of plaintiff's hotel was bad, as being a house of assignation and prostitution, and there is no evidence that any of the defendants, except possibly one, signed or published any other statement concerning plaintiff or the house which he kept. There is no competent evidence in this record that there was any conspiracy among these defendants to injure the plaintiff or his business.
3. **Limitation of Actions: LIBEL.** If one of several defendants makes libelous statements concerning plaintiff without the knowledge or consent of the other defendants, evidence thereof is not competent against the other defendants, and an action against the defendant so offending would be barred in one year by the statute of limitations.

REHEARING of case reported in 97 Neb. 812. *Judgment of district court reversed and action dismissed.*

SEDGWICK, J.

In our former opinion (97 Neb. 812) the judgment of the district court was affirmed. Upon consideration, a rehearing was ordered, further briefs have been filed and

*December 3, 1915. *Reversed and remanded.*

arguments have been heard in the case. The cause of action is stated in the petition as follows:

"That the defendants unlawfully, maliciously and wickedly intending to injure the plaintiff and to ruin the plaintiff in his business and to make it impossible for the plaintiff to get custom for his said hotel and boarding house and to earn a living for himself and family, and with the intent and purpose to coerce and to force the plaintiff against his will to quit said business and said hotel and boarding house and to leave the said village of Orchard, in violation and in disregard to the laws of the state of Nebraska, and with intent to injure plaintiff in his good name and character as a good moral citizen, and in his good name as a business man and keeper of his said hotel and boarding house, did falsely and maliciously publish of and concerning the plaintiff, and of and concerning his said hotel and boarding house, and caused it to be believed, that the plaintiff was guilty of keeping a house of ill fame, and that he (the plaintiff) was using his said hotel and boarding house for and as a house of ill fame resorted to for the purpose of prostitution, and did, on or about the 6th day of January, 1908, unlawfully, maliciously, wickedly and secretly combine, confederate and conspire together, and that they did then and there wickedly design, construct and compose, and did unlawfully and wickedly abet counsel and assist each other in designing, constructing and composing of a certain wicked contrivance in writing, in substance following, to wit: 'Mr. Deupree: Notice is hereby given that we, the undersigned town board and citizens of Orchard, have absolute evidence that you are keeping a house of ill fame, and that you are hereby notified to leave town in ten days'—and signed by Nels Lindquist, Sidney D. Thornton, Jr., Ora J. Goldsmith, Archie D. Joyce, John Thomas Fletcher. That the defendants, in pursuance of the aforesaid agreement and conspiracy, did, on or about the 6th day of January, 1908, publish and cause to be published of and concerning his said hotel and boarding house said wicked, false and libelous contrivance in writing, and caused the same to be circulated through the village of

Orchard, and among the good people of said village of Orchard and surrounding country; and continued to publish and circulate said wicked, false and libelous contrivance, and continued to cause the same to be believed of and concerning the plaintiff and his said hotel and boarding house, until plaintiff was forced, against his will, by reason of said publication, to quit said hotel and boarding-house business on or about the 16th day of October, 1909, and to quit the town of Orchard on or about the 18th day of October, 1909."

The evidence establishes that, for several months during the latter part of the year 1907, the plaintiff was keeping a hotel and boarding house in the village of Orchard, a town of about 500 inhabitants, and that the general reputation of his house in that village was bad. The defendants produced nine or ten witnesses who so testified. Some of these witnesses showed but little knowledge in the matter, and their evidence was indefinite and unsatisfactory, but many of them appear to be responsible citizens of the village who knew the general reputation of the hotel, and their evidence is clear and satisfactory. The plaintiff produced in rebuttal four witnesses. Mr. Ryan testified that he was a carpenter by trade and worked in the village. He was asked: "Mr. Ryan, did you ever hear anything against that hotel or the girls in that hotel prior to the time you heard of this petition being circulated?" He answered: "No, sir; I didn't." Mr. Andrews testified that he lived in the village in 1907 and in 1908. He was asked: "Did you ever hear anything derogatory to Mr. Deupree or the reputation of the house or girls that were there prior to the time these men presented the petition up there charging the hotel with immorality? A. No, sir; I never heard anything." Upon cross-examination he said: "To tell the truth I never heard very much talk since, as far as that goes. Q. You were living there in the town? A. Yes, sir; I don't hear much of what these people do; I don't know what the reason is I don't." Mr. Howard testified that he had lived in Orchard for a number of years. He was questioned about a particular girl who had worked in

the hotel, and was then asked: "There was nothing about that girl's reputation before this talk about the hotel? A. I don't know. Q. There was nothing about the other girls' reputation before the talk and this petition was circulated up there? A. No, sir; I don't know." On cross-examination he testified that he was not in town during the fall of 1907. Mr. Hagerman had lived in Orchard about eight years. He was asked: "Did you ever hear anything about this hotel—about its reputation—prior to the time you heard of this petition being circulated? A. No, sir." On cross-examination he was asked: "Was there any talk about any of the girls around there? A. I don't remember whether I heard any or not." None of these witnesses testified that he knew the general reputation of the house.

When we consider that this evidence was given more than four years after the transaction in question, and also the leading character and indefiniteness of the questions, it can hardly be said to have any probative force. The whole evidence establishes beyond any reasonable doubt that the general reputation of the plaintiff's hotel in that community for several months in the latter part of the year 1907 was bad, as being a house of prostitution and assignation. Three of these defendants were members of the board of trustees of the village. Mr. Thornton was clerk of the board, and not a member of the board, as supposed in our former opinion. The defendant Hicks was not the marshal of the village, as suggested in our former opinion, and was "runner" for a competing hotel. It is clear from this evidence that these defendants and a large number of citizens of the village signed a paper of some kind, but it is wholly uncertain as to what were the contents of this paper. The plaintiff in his petition alleged that the "substance" of this paper was: "Mr. Deupree: Notice is hereby given that we, the undersigned town board and citizens of Orchard, have absolute evidence that you are keeping a house of ill fame, and that you are hereby notified to leave town in ten days." This was alleged by the plaintiff, and, as the instructions show, was

also considered by the court as indicating that the purpose and object of the petition was to drive plaintiff from the town and ruin his business. There is no evidence in the record as to the contents of this paper except the evidence of the plaintiff himself. He testifies that he never saw the paper, and testifies only to what he claims some of the defendants told him was the substance of the paper. Even as to what he was told was the substance of the paper, his evidence is very indefinite and unsatisfactory. He testified that he had a conversation with the defendant Fletcher some time in the following June, and was then asked the question: "Now, tell the jury what you said to Mr. Fletcher about reports that were circulated about you, and what Mr. Fletcher said about that, particularly what was said about a petition that had been circulated in Orchard. * * * Q. Did he say what was in the petition? A. That in the petition, that I was running a house of ill fame, and that the town board had got the petition out and signed it and circulated it to that effect to keep me out of business." He testified to a statement made by another member of the board: "He told me the same as Mr. Fletcher, that the town board had been misinformed that I was running that kind of a house, and they got up the petition that I was running a house of ill fame, and they signed it and circulated it to that effect thinking it was so." These defendants positively denied ever having made any such statements to the defendant; but, if the evidence of the plaintiff as to these statements is to be believed and considered competent, it comes far short of proving that the paper signed by these defendants contained any demand that the plaintiff should leave town. It stated, according to the plaintiff's final version of the matter, that the plaintiff "was running a house of ill fame," and the evidence establishes, as before observed, that this was the general reputation of the house, which is, at least *prima facie,* evidence that the statement contained in the paper was true. To sign, and even to circulate, a statement which would be libelous if untrue, but which is in fact true, cannot of itself be evidence of conspiracy.

The whole evidence, taken together, is consistent with the purpose on the part of these officers to do away with a bawdy house in their village, rather than to injure the plaintiff. If so, the paper was signed by them "with good motives, and for justifiable ends." Const., art. I, sec. 5.

There is evidence in the record that the defendant Hicks attempted to divert customers from the plaintiff's house in favor of the house by which he was employed, and that upon divers occasions he used extravagant language in explaining what he considered was the reputation of the plaintiff's house; but there is no evidence that any other of these defendants was in any way responsible for Mr. Hicks' conduct, and, if he made himself liable for slander, any action for damages caused thereby was barred long before this action was begun. Upon re-examination of the record and further consideration, we are satisfied that the evidence wholly fails to support any cause of action against these defendants. Even if a cause of action had existed, it would be barred by the statute of limitations. It does not appear that any further or different evidence can be furnished.

The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

LETTON, J., concurring.

I concur in the conclusion. I think the evidence is sufficient to show a concert of action and conspiracy by the members of the town board, but that it fails to show any action by them or either of them within four years, or that the wrongful acts of Hicks committed within four years took place with their knowledge or by their consent, procurement, or approval.

HAMER, J., dissenting.

I am not quite able to agree with the majority opinion. In the eighth paragraph of the petition it is said that prior to the publication of the false charges the traveling public stopping over at Orchard, as also the transient custom, neglected to patronize plaintiff's hotel and were induced to

do so by the defendants. In the 9th paragraph it is set forth that by reason of the false statements made by the defendants and their false charges and false publications the plaintiff sustained the damages which he claims. The answer sets up the statute of limitations as a bar to bringing the action. I am not ready to agree that the statute is a sufficient bar when the answer admits that the acts were done and alleges a justification which it seeks to establish. The bar of the statute is taken away when the defendants admit that they did the acts complained of. They say thereby that they will not avail themselves of the bar of the statute which might be used to prevent an inquiry concerning the facts. They present an issue demanding a trial of the facts. When they do that they abandon the protection of the statute which would prevent such an inquiry. They allege that the plaintiff kept the hotel in a filthy and unclean condition, and that during a greater part of the time loose and immoral women whose reputations were bad were connected with the hotel and worked in it, and that during part of the time men whose reputations were bad patronized the establishment, and that the reputation of the hotel was bad long before the month of January, 1908; that the reputation of the hotel injuriously affected its business and kept business away; that acts of immorality were committed within the hotel with the knowledge, consent and connivance of the plaintiff. The foregoing alleges a stout justification upon the part of the defendants of what they were charged with doing. When the defendants set up the statute of limitations as a bar to plaintiff's action they present a barrier, but when they allege the truth of the charges made against them in the plaintiff's petition and justify them they throw away this barrier and invite the plaintiff to combat upon the facts. In substance defendants said in their answer that the plaintiff kept an immoral house filled with immoral men and with women who were prostitutes and engaged in the practice of prostitution, and that the building was lacking in cleanliness and that the food was dirty and ill prepared. They said that the plaintiff destroyed his business

by this misconduct and neglect. They presented this issue to the court and jury. They asked to try it and they were permitted to do so. The jury returned a verdict against them and the court gave the plaintiff judgment upon it. Having invited this contest and having lost it they now seek to avail themselves of the benefit of the statute, notwithstanding their abandonment of its protection. The defendants were not obliged to rest their defense upon this statute. They could have made any other defense they saw fit to make. Having rested their defense upon a justification of the offensive charges against the plaintiff, which they say they made, they will be deemed to have abandoned their plea that the statute protects them. If they had not made that plea, but had sought to justify their charges against the plaintiff by alleging that they were true, and a verdict had been rendered against them, supported by sufficient evidence, then the same would stand, although the statute of limitations might have been successfully pleaded.

The litigant must confine his journey to the road on which he invites the court and his adversary to travel with him. One who tenders an instruction which is given by the court and which assumes the existence of evidence to establish an issuable fact cannot afterwards be heard to say that there is no evidence in the case which tends to prove such fact. *American Fire Ins. Co. v. Landfare,* 56 Neb. 482. In that case the defendant requested the court to submit a question of fact. He was not allowed afterwards to say that there was no evidence upon which to submit it. This rule is based upon the idea that when a party by his language or conduct in the trial induces the court to take a certain action he cannot afterwards in the same case say that there was no foundation for such action. *Sorensen v. Sorensen,* 68 Neb. 509.

In *Missouri P. R. Co. v. Fox,* 60 Neb. 531, it is said in the syllabus: "It is a sound and salutary principle that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about." The application of this principle to the case at bar would leave

the judgment for the plaintiff standing. Along the same line it is stated, in substance, in the syllabus in *Chicago, R. I. & P. R. Co. v. Kerr,* 74 Neb. 1, where from the nature of the answer and the testimony adduced it appears that both parties have placed the same construction on the petition, the supreme court will not ignore such construction in ruling on the sufficiency of the petition, even though the petition, standing alone, might not admit of such construction.

An examination of the record shows that the defendant, Hicks, talked against the plaintiff's hotel. He seems to have spoken to a lady in the presence of the plaintiff's 13 year old daughter. He told the lady to go to the Cottage house, that the plaintiff's house was not a decent place to stop at. This testimony was stricken out and therefore was not properly before the jury but it tends to show the disposition of Hicks. He seems on other occasions to have been violent in his description of the house. He used language to indicate that it was kept for purposes of prostitution. It seems that Hicks would go to traveling men and tell them not to go to the plaintiff's hotel. This was within the four years allowed by the statute. If the testimony shows that Hicks and the other defendants conspired together in what they said and did then the other defendants are liable with Hicks because of the fact that what Hicks did was only a continuation of the plan in which they all co-operated.

In view of what I understand the facts to be and the law as it should be declared applicable to them, I am unable to vote for the majority opinion.

ANDREW MOORE, APPELLANT, V. G. H. BUSSE ET AL., APPELLEES.

FILED OCTOBER 16, 1915. No. 18307.

1. **Indians: ALLOTTEE: DEVISE.** The act of congress (36 U. S. St. at Large, pt. 1, p. 856, sec. 2), authorizing a member of the Omaha tribe of Indians to whom land had been allotted under the prior act of congress to devise his interest in the land by will, is not inconsistent with the prior act.

2. **———: WILLS: APPROVAL.** The provision in the later act that such will should not be valid unless approved by the Commissioner of Indian Affairs and the Secretary of the Interior does not require that such approval must be contemporaneous with the making of the will, or before the death of the testator. If the will and probate thereof are regular, the interest of the testator in the land passes to the devisee upon the approval of the proper officials.

APPEAL from the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed.*

Hiram Chase, for appellant.

T. R. Ashley and *Curtis L. Day, contra.*

SEDGWICK, J.

The act of congress which provided for the allotment of lands in severalty to the Omaha tribe of Indians provided: "That upon the approval of allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any convey-

ance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, that the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered." 22 U. S. St. at Large, p. 342, sec. 6.

Afterwards, in 1910, congress enacted: "That any Indian of the age of 21 years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of the Interior: Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs and the Secretary of the Interior." 36 U. S. St. at Large, pt. 1, p. 856, sec. 2.

A tract of land was allotted to one Benjamin Moore, who under the act of congress, and afterwards pursuant to the subsequent act of congress above quoted, duly executed his will, whereby he devised his interest in a part of the tract of land to his wife and his interest in another part thereof to his nephew and niece. Soon afterwards he died, leaving no children, but leaving a brother, this plaintiff. The plaintiff began this action in the district court for Thurston county, claiming the land as the sole heir of his deceased brother. A general demurrer to his petition was sustained and his action dismissed, and he has appealed to this court. The appellant presents two questions for our consideration:

1. Upon the first point it is urged that the act of congress of 1882 constituted a contract between the United States and the several allottees of land, and that in case of the death of an allottee the contract is for the benefit of heirs and is "irrevocable and indestructible." Even if this statute could be considered to be a contract between the

government and the allottee, it is difficult to see how it could be construed to be a contract with the heirs of the allottee. The ancient maxim, *nemo est hæres viventis*, seems inconsistent with such a theory. The act of 1910 does not appear to abridge the rights of the allottee under the former act, but rather increases those rights, giving the power of disposing of his interest in the allotment by will. If this act of congress is declared to be unconstitutional, it will have to be done by the supreme court of the United States, so far as this court is concerned.

2. By the act of 1910, allottee "shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will." It is a mistake to suppose that this act contains any limitation upon the rights of a member of the Omaha tribe to make a will, or attempts to dictate in any way in what manner he shall dispose of his property in general. The act applies to the allottee's right in the land under his allotment, and, in order to dispose of that right, he must proceed in accordance with the rules and regulations to be prescribed by the Secretary of the Interior, and no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs or the Secretary of the Interior. The section is dealing with the allottee's interest in the land, and not with any other property or interest, and this language merely means that it shall not have the effect to transfer the allottee's interest in the land to the devisee unless such transfer is approved. The lands are held in trust by the government for 25 years, the allottee having in the meantime the occupancy and use thereof. The purpose of this restriction is to prevent the allottee from squandering his interest in the land, and so the proviso that it must be approved by the proper officers of the government is for a similar purpose—to guard against the procurement of such devise by fraud or undue means. This testator desired that his interest in the allotment should go to his widow and to his nephew and niece, rather than to his brother, and this disposition of the property was

approved by the government officials. The approval was recommended in these words: "I hereby recommend that the within will be approved, so far as it relates to the original allotment of the devisor still remaining in trust, namely, the W. ½ of the S. E. ¼ of Sec. 5, T. 24, R. 10, Nebraska." This recommendation was adopted by the proper officers. The will is approved, so far as it relates to the original allotment of devisor still remaining in trust. This is in accordance with the purpose of the act of congress, which has to do with the land and the right thereto, and not with the right and manner of making a will. The act of the testator was complete before his death by the execution of the will. This will did not take effect at his death, but when it was admitted to probate, and, as to his interest in government land, when it was properly approved for that purpose. We think, therefore, that the fact that it was approved after, and not before, the death of the testator is immaterial. A statute which required its approval before the death of the testator would in many cases defeat its own purpose. Wills are frequently made in anticipation of immediate death, and when it would be impossible to obtain the approval of the government officers, if this statute should be so construed.

The judgment of the district court is

AFFIRMED.

LETTON and HAMER, JJ., not sitting.

M. ELLA DAVIDGE, APPELLEE, V. KATE TALBOT, APPELLANT.

FILED OCTOBER 16, 1915. No. 19072.

1. **Adverse Possession.** One who has been in exclusive, notorious possession of real estate for more than ten years acquires title thereto against all persons against whom he holds such possession adversely. If he claims the right of possession under a deed of conveyance, such possession will be adverse to the parties executing the deed, and the ten years' statute of limitations will run against such parties while the land is so held.

2. ———. In such case the statute will continue to run against one who has executed a valid deed of the premises under which the land is so held, although a later conveyance in the chain of title is found to be invalid.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

W. C. Fraser and *Crofoot & Scott,* for appellant.

Rosewater & Cotner, contra.

SEDGWICK, J.

This action was submitted upon a case stated under rule 14 (94 Neb. XIII). Upon the trial in the court below, a decree was entered in favor of the plaintiff, quieting her title against the defendant, from which decree the defendant has appealed.

It appears that in January, 1889, the defendant and her husband executed and delivered to one J. W. Squires, as trustee, their mortgage deed of the premises in question to secure the payment of $1,700, and afterwards an action was begun to foreclose the mortgage, in which the defendant's husband was made a party defendant, but the defendant was not made a party. There was a decree entered foreclosing the mortgage. The premises were sold upon the decree and the sale confirmed, but no deed was ever executed to the purchaser. Soon after the execution of the mortgage, the defendant and her husband executed a warranty deed conveying the premises to Milon S. Lindsay, and in the following year, after the execution of the mortgage and the deed to Lindsay, Mr. Lindsay and wife conveyed the premises to Sherwood B. Davidge, as trustee, and soon afterwards the same parties executed a quitclaim deed to the Davidges. Mr. Davidge, claiming under the foreclosure of the mortgage and under these deeds, took possession of the premises more than ten years before this action was begun.

Some interesting questions are presented and discussed in the briefs in regard to the effect of the foreclosure pro-

ceedings and the possession thereunder as barring the wife's inchoate dower, and in regard to the wife's right to redeem from the lien of the mortgage, but we do not find it necessary to rely upon or discuss those questions.

This defendant, as the wife of James Talbot, executed and delivered, as we have already said, a warranty deed of these premises, through which this plaintiff and her grantors claim the title and possession of the premises. This claim, of course, was adverse to all of the parties executing the warranty deed, and the plaintiff and her grantors had held notorious and exclusive possession under this adverse claim of right for more than ten years before this action was begun. The statute of limitations had clearly run upon this defendant's right, and the decree of the court quieting the title in the plaintiff must be affirmed.

It is said in the brief that one of the deeds in the plaintiff's chain of title was afterwards adjudged to be void, and it is contended that, for that reason, the plaintiff has not a good title under those deeds. This, of course, is true. One of the deeds in her chain of title being void, her title would fail, and might have been seasonably challenged for that reason, but this fact would not stop the running of the statute against this defendant who had executed a valid deed. It seems to be contended that the plaintiff's grantors knew that the deed which was executed by the defendant's grantee was invalid when they took possession of the premises, and that, knowing it to be void, they cannot be said to be claiming possession thereunder. If there is any merit in such a proposition (which we do not decide) it cannot have application in this case. If the defendant's deed was valid, she could not defeat plaintiff's possession because the deed of her grantee was invalid. If the plaintiff cannot be said to hold adversely to the party executing the invalid deed, she still holds adversely to the defendant, since she and her grantors could rely upon the defendant's deed in any claim made by her. The plaintiff and her grantors were in possession claiming under these deeds,

and their claim was adverse, at least, to all of the parties executing valid deeds.

The judgment of the district court is

AFFIRMED.

SAMUEL J. COFFMAN ET AL., APPELLEES, V. MATT MALONE, APPELLANT.

FILED OCTOBER 30, 1915. No. 18286.

Parol Evidence: SHAM CONTRACTS. Parol evidence is admissible to show that the parties to the suit had mutually agreed that a written contract which plaintiff is seeking to enforce was never to be performed, but was a mere sham executed for the purpose of influencing the conduct of a third person.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Reversed.*

Murphy & Winters, for appellant.

Smyth, Smith & Schall, contra.

MORRISSEY, C. J.

Amos Snyder, Matt Malone and Samuel J. Coffman owned all of the capital stock in a corporation called the Snyder-Malone-Coffman Company, which was doing a live stock commission business in South Omaha. During the fall of 1912, slight differences as to the conduct of the business arose, and December 12 the following writing was drawn up and signed by the parties:

"South Omaha, Neb., Dec. 12, 1912. We, Amos Snyder and S. J. Coffman, have this day sold our interest in the Snyder-Malone-Coffman Company to Matt Malone. The said Amos Snyder to receive $1,500 for his interest, and said S. J. Coffman is to receive $1,000 for his interest, and said business is to be turned over to Matt Malone on December 31, at 6 o'clock P. M., and all bills to be paid up to that time, that is, owed by the firm of Snyder-Malone-

Coffman Company, and, after the bills are all paid, each, Snyder and Coffman, can draw out the balance they have to their credit. Amos Snyder has received on this contract ($200) two hundred dollars, and S. J. Coffman has received ($100) one hundred dollars. This contract made and signed by Amos Snyder, S. J. Coffman and Matt Malone this 12th day of December, 1912.

"Amos Snyder,
"S. J. Coffman,
"Matt Malone."

December 31, 1912, Snyder delivered his stock, tendered his resignation as president of the corporation, and received from Malone the balance due. Four or five days thereafter the articles of incorporation were redrafted and Coffman and Malone signed the same. Coffman made no assignment of his stock, and neither made nor tendered his resignation as an officer of the corporation until January 15, 1913, when he made an assignment of his stock and tendered the same, together with his resignation, to Malone, and demanded the amount stipulated in this writing. Malone refused to receive the stock or resignation or to pay over the money, and Coffman brought suit upon the contract.

Malone by answer alleged that the writing was executed for the sole purpose of purchasing the interest of Amos Snyder, but it was drawn in the form set out because they wanted Snyder to believe that Coffman was also retiring from the business; that there was a contemporaneous oral agreement between him and Coffman that, as between them, it was not to be performed; that there was no delivery of the writing to Coffman; and that the check which was delivered was not to be cashed, but was to be returned again by Coffman to Malone. There is an allegation, also, that after Snyder retired from the business, and after the expiration of the time fixed by this writing for the transfer of Coffman's stock, Coffman participated in the election of himself as secretary of the company, and that he continued to act for and in behalf of the company until January 15, 1913; that under their oral agreement Malone

was to transfer certain of Snyder's shares of stock to Coffman, which Malone was ready and willing to do, but Coffman did not have the money to pay therefor, and, upon Malone's refusal to accept Coffman's note in lieu of cash, Coffman attempted to repudiate the oral agreement and to enforce this writing.

A jury was waived and the cause tried to the court. Oral testimony was admitted in support of the allegations of the answer. But at the conclusion of the trial, on motion of the plaintiff, the court struck from the record the testimony which had been received in proof of the oral agreement, and entered judgment for plaintiff for the amount due under the writing. There are three assignments of error; but, as the one directed against the ruling of the court in striking this evidence goes to the merits of the whole controversy, it is the only one we will consider. If the ruling in that regard is correct, the judgment is warranted by the pleadings and the proof. No doubt the court relied upon the general rule laid down in *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Neb. 545, and quoted as authority in *Nebraska Land & Feeding Co. v. Trauerman*, 70 Neb. 795, wherein it is held: "Parol evidence is incompetent to prove a contemporaneous oral agreement by which it is sought to change or alter the terms of a written contract and the result of which would be to change the effect of the written contract in a material portion and to insert or read into it a condition or reservation not contained in it, or implied by its terms"—while the appellant contends that the rule invoked does not apply, and that a party who has been induced to sign a written contract for a certain purpose is entitled to offer oral testimony, not for the purpose of varying its terms, but for the purpose of showing that it was never intended to be a contract or to be of binding force between the parties. It is not contended that the contract is ambiguous or incomplete, but that plaintiff and defendant were working together for a common purpose; that, in furtherance of this common purpose, it was executed in its present form; that they were not dealing one with the other, but were jointly

dealing with Snyder; that, in the very nature of things, the writing could not contain the agreement between Coffman and Malone, because that would defeat its purpose. If there was no intention on the part of either party to observe the terms of this writing, as between them, this writing was not the contract.

This evidence was not offered with the view of contradicting, varying, or explaining the language employed in the written instrument, but to establish a fact or circumstance collateral to the original writing which would control its effect or operation as a binding engagement. On either theory the writing is precisely what both parties intended it to be. If there was an express agreement between Coffman and Malone that it was not to be carried out, Malone in signing was acting, not alone for himself, but also for the plaintiff, and in that event it never became a binding obligation. "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." *Norman v. Waite,* 30 Neb. 302.

In *Barnett v. Pratt,* 37 Neb. 349, in discussing a somewhat similar question, the court said: "It is settled by a considerable line of authority that where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument."

The doctrine laid down in *Norman v. Waite, supra,* has been reiterated in *Davis v. Sterns,* 85 Neb. 121, *First Nat. Bank v. Burney,* 91 Neb. 269, and *Exchange Bank v. Clay Center State Bank,* 91 Neb. 835, and is the settled rule in this state.

This evidence having been erroneously stricken from the record, it follows that the judgment of the district court must be reversed and the cause remanded.

REVERSED.

FAWCETT, and HAMER, JJ., not sitting.

ROSE, J., concurring.

The question presented by the record seems to be: Is parol evidence admissible to show that the parties to the suit had mutually agreed that a written contract which plaintiff is seeking to enforce was never to be performed, but was a mere sham executed for the purpose of influencing the conduct of a third person? The question is a sensitive one, because an error in its solution may result either in a departure from the rule which forbids the use of parol evidence to vary a written instrument or in rewarding a wrong by closing the door to judicial scrutiny. The supreme court of Vermont has answered the question in the negative. *Conner v. Carpenter,* 28 Vt. 237; *Town of Grand Isle v. Kinney,* 70 Vt. 381. The better reasoning, however, and the weight of authority seem to be to the contrary.

In 4 Wigmore, Evidence, sec. 2406, it is said: "Conduct which is to be given legal effects must be jural in its subject * * * i. e. must concern legal relations, not relations of friendship or other nonlegal relations. * * * In all such cases, therefore, the conduct is legally ineffective, or void. In the traditional phraseology of the parol evidence rule, then, it may always be shown that the transaction was *understood by the parties not to have legal effect.* Ordinarily, the bearing of this principle is plain enough on the circumstances. It has been judicially applied to household services rendered by a member of the family, and to a writing representing merely a family understanding. It is, of course, also applicable to the signature of an attesting witness. When the document is to serve the purpose of a mere *sham,* this principle in strictness exonerates the makers; but a just policy would seem to concede this only when the pretence is a morally justi-

fiable one (as, to calm a lunatic or to console a dying person), and not when it is morally beyond sanction."

In *Southern Street Railway Advertising Co. v. Metropole Shoe Mfg. Co.*, 91 Md. 61, a suit upon an advertising contract, defendant pleaded that the "paper-writing was not intended to create, and did not create, any legal relationship whatsoever; that said paper was signed by the defendant upon the request of plaintiff's agent, in order that the plaintiff or its agents might show the same to other persons dealing with the plaintiff, in order to induce such other persons to pay the rates for advertising mentioned in the contract, and that it was distinctly understood that the paper-writing was not a contract between the parties thereto, and that the bringing of a suit thereon is a fraud upon the defendant." The court said: "The rule against parol evidence to vary or contradict the terms of an agreement in writing is well settled by the courts. It is earnestly insisted upon the part of the appellee that this rule has no application to this case, because the testimony was offered, not for the purpose of varying or contradicting the contract, but to show that the parties to the writing never intended it to be a contract or as the binding record of a contract. We think the court below was right in admitting the evidence. * * * We come then to the evidence as set forth in the bills of exception, and we think it is clear that it was competent for the purposes offered, that is, not to vary or contradict the terms of the written instrument by parol, but to show that such contract had no force, efficacy or effect, because it was not intended to operate as the record of a binding contract between the parties."

In *Colonial Park Estates v. Massart*, 112 Md. 648, the court approved and followed the preceding case, saying: "Although parol evidence is inadmissible to vary or contradict the terms of a written agreement, it is well settled that such evidence is admissible to show that a particular written paper 'was never intended as a contract or the binding record of a contract between the parties.' And this has been held to be true even though the paper-writing in question be in the form of a contract and bear the

signatures of those named in it as the contracting parties. We distinctly held this to be the law upon the authority of many cases, both English and American, cited by us in the *Southern Street Railway Advertising Co. v. Metropole Shoe Mfg. Co.*, 91 Md. 61. The supreme court of the United States in *Burke v. Dulaney*, 153 U. S. 228, upon a review of the cases upon this subject, reached the conclusion there stated in its opinion that, 'The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time the suit is brought. But the rule has no application if the writing was not delivered as a present contract,' and parol evidence was admissible to show that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations." See, also, *Birely & Sons v. Dodson*, 107 Md. 229.

In *Humphrey v. Timken Carriage Co.*, 12 Okla., 413: "The defendant offered evidence to show that the order for the goods, which is made the basis of plaintiff's action, was given at the solicitation of the plaintiff's agent, Slusser, who represented that he had sold a car-load of goods to B. F. Berkey, but that Berkey was involved financially and it was feared that a shipment to Berkey would involve the Timken Carriage Company with other creditors; that if he, Humphrey, would sign the order for the goods, he would not be held liable for them; that it would be used only for the specific purpose of enabling the Timken Carriage Company to sell and ship goods to Berkey without danger of having them attached by other creditors; and that the order was signed for this and for no other purpose." The court sustained the defense, saying: "Admitting that the order so signed was a contract in writing, was it not competent to prove that it was not intended as such, and was in fact executed and delivered for an entirely different and specific purpose? Under the law, as generally accepted and enforced in this country, parol evidence is not competent to change or vary a written agreement; but when does a writing become an agreement? Certainly not until it is assented to in the sense that its

tenor purports. As between the parties, a written instrument which is understood to have a particular import and meaning cannot by one of the parties thereto, without the knowledge or consent of the other, be so diverted from the purpose of its execution as to fix other and new liabilities not contemplated when made. Such a construction of the law wholly destroys the definition which time-honored customs and rules have given to contracts, to wit, that two minds must meet and consent."

In *Grierson v. Mason,* 60 N. Y. 394, defendant offered proof that a contract relied upon by plaintiff was not intended to be a contract between the parties, but was executed to enable defendant to procure advances upon goods, and that the contract was delivered to the party making the advances. The court said: "The object of the testimony was to show that the instrument was executed for a specific purpose, and, that purpose being accomplished, was of no effect in changing the contract previously made with the defendant. I think that it was competent evidence for this purpose. The defendant had made out a contract. The plaintiff proved an instrument which altered the contract, and the defendant had a right to prove that the instrument introduced was not intended as an alteration of the contract, but with a view of accomplishing a particular purpose. Such evidence was not given to change the written contract by parol, but to establish that such contract had no force, efficacy or effect; that it was not intended to be a contract, but merely a writing to be used in inducing Woods to make advancements upon the goods. This is in avoidance of the instrument, and not to change it, and I do not see why the testimony was not as competent in this case as it would be to show that a written instrument was obtained fraudulently, by duress, or in an improper manner. Such evidence does not come within the ordinary rule of introducing parol evidence to contradict written testimony, but tends to explain the circumstances under which such an instrument was executed and delivered, or to show that it was canceled or surrendered."

In *Oak Ridge Co. v. Toole,* 82 N. J. Eq., 541, the defendant to the bill in equity answered that the contract to purchase the lands was entered into merely for "selling purposes." The court said: "He rests his defense upon the ground that the agreement, while signed by his client, was to have no binding effect upon him. I think his position is well taken and I agree with his view of the case. In *O'Brien v. Paterson Brewing & Malting Co.,* 69 N. J. Eq. 117, practically all the questions involved in this issue are thoroughly and exhaustively discussed by the learned vice-chancellor. This case, it seems to me, establishes the rule, that if the parties to an agreement stipulated at the time that it was made that it was to have no binding effect upon them, then, notwithstanding their execution of the agreement, such a contract is of no force and effect at law or in equity. The rule now so well established in equity, admitting parol evidence to show for what purpose the written agreement was executed, was properly invoked by the defendant. The evidence leaves no doubt in the court's mind that in this issue the agreement between the complainant and the defendant was made for the purpose as stated by the latter and his witnesses. It is inequitable and unjust, therefore, for the complainant to enforce the agreement of April 13."

Western Mfg. Co. v. Rogers, 54 Neb. 456, appears to hold that the evidence is inadmissible, but is distinguishable. This case is cited and followed in *State Bank of Ceresco v. Belk,* 56 Neb. 710, where *Burke v. Dulaney,* 153 U. S. 228, quoted in the Maryland decisions, is distinguished on the ground that there "never was any complete final delivery of the writing as the promissory note of the makers payable at all events and according to its terms." The distinction between the Nebraska cases cited and the present case is pointed out in 4 Wigmore, Evidence, sec. 2435, where it is said: "An extrinsic agreement providing a *condition qualifying the operation* of a written obligation is of course equally ineffective; for an obligation absolute is plainly exclusive of a condition. So far as the present principle is concerned, there is no

doubt. But by the general principle of delivery (*ante*, sec. 2410) no conduct becomes effective as a legal act if its consummation is suspended until the happening of a condition precedent; and, hence, such a condition, precedent to the existence of the obligation, may always be established, and has the effect of destroying the apparent obligation of the writing embodying the draft of the act. The difficulty is to distinguish whether, in a given case, the condition is such a precedent one, or whether it is a subsequent one such as the present principle forbids recognizing. Here some subtlety of construction may be required."

In a note the author says: "Sometimes, the illustrations of this principle, that a transaction which is a *sham* is without the scope of legal acts, are hard to distinguish from those cases where the transaction is in substance a legal one, but the understanding is that it shall be merely *nominal;* here, in effect, one party agrees to hold the other party harmless, and this involves rather the rule about varying a document's terms." 4 Wigmore, Evidence, sec. 2406.

The opinion delivered by the chief justice is supported by the weight of authority and is in harmony with the holding in *Davis v. Sterns,* 85 Neb. 121. I therefore concur.

GEORGE P. MCENTIRE ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 30, 1915. No. 18057.

OPINION on motion for rehearing of case reported, *ante*, p. 92. *Rehearing denied.*

BARNES, J.

A motion for rehearing has been filed in this case, and on the argument of appellees in support thereof they contend that the court in its former opinion (*ante*, p. 92) had placed a wrong construction on the act providing for

a uniform bill of lading. The essentials of that bill are as follows: "The carrier * * * of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided. * * * For loss, damage, or delay caused by fire occurring after forty-eight hours * * * after notice of the arrival of the property at destination * * * has been duly sent or given, the carrier's liability shall be that of warehouseman only. * * * Property not removed by the party entitled to receive it within forty-eight hours * * * after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only."

In support of their contention they cite *Gary Bros. & Gaffke Co. v. Chicago, M. & P. S. R. Co.*, 49 Mont. 524, and attempt to show that the decision in that case should rule our decision in the case at bar. We have examined that case and are of opinion that it can easily be distinguished from the facts in this case. In the Montana case there was a shipment of two car-loads of potatoes to be carried safely to Butte, Montana, and there delivered to F. C. Downing upon the payment of freight charges thereon. On the morning of October 26, 1911, Downing was notified of the arrival of the cars at Butte. He thereupon came to the office of the railroad company and requested that they be set out upon its delivery track. This was done. He then, in company with a prospective purchaser, inspected the potatoes, but allowed them to remain in the car on the delivery track. It does not appear that he took charge of the shipment. On the 27th he informed the company's agent that the potatoes had been frozen during the night. It is apparent that in that case there was no complete delivery of the potatoes, and they were frozen while still in charge of, and in the hands of, the railroad company. It is not claimed that Downing had paid the freight charges, and it is apparent that all he did was to inspect the potatoes and ascertain their condition. He left them

in the possession and charge of the railroad company, and on that night, or the following morning, they were frozen.

In the case at bar, however, the railroad company notified the consignee that the two cars of furniture had arrived at their place of destination. He requested that the cars be set out upon the unloading track, which was done. It is claimed, however, that the car which was destroyed by fire was opened by him through mistake, and that he never intended to accept delivery of that car. The facts shown by the record are that the consignee first opened the car which burned, and found that it was loaded with mattresses. He desired to unload the iron beds first, and proceeded to that car with the drayman and unloaded it. They worked at unloading all afternoon, in the meantime leaving the door of the other car open from 12 to 18 inches until about 6 o'clock in the evening. When night came plaintiff's secretary directed that a padlock be procured and placed upon the car, the other car having been unloaded, which was done by one of the employees. He called up the agent of the railroad company, who had left the office, and, having ascertained that fact, he asked the telegraph operator to seal the car. When informed that he could not do so, he asked if it was all right for him to place a lock on the car. The operator answered that it was all right so far as he was concerned; that he had no objections. The consignee did not attempt to deliver the key to the railroad company or any of its agents or employees, but retained it in his own possession. It thus appears that the consignee had accepted the delivery of the cars, had full charge of them, had unloaded one of them, had placed a lock purchased by himself on the other, and retained the key himself. The railroad company had parted with possession of the contents of the car before the fire occurred. The provisions of the uniform bill of lading quoted above have no application to a case where the control of the goods has passed to the consignees. As to the origin of the fire, the record is unsatisfactory; but, since it was first discovered in the interior of the car, it may be reasonably inferred that it was occasioned by leaving the car open

during the time the consignee was unloading the other car, and that it would not have happened if the seal had remained unbroken and the door closed.

As we view the record, our former opinion was right, and the motion for rehearing is therefore

OVERRULED.

SEDGWICK, J., dissenting.

The question to be determined is whether the railroad company was liable as a common carrier or as warehouseman only. The contract, which is set out in the majority opinion, determines the question. It provides in what cases the liability shall be limited to that of warehouseman: First. If fire occurs after 48 hours after notice of arrival, the liability shall be that of a warehouseman only. This fire did not occur after 48 hours. Second. It provides that, if the property is not removed within 48 hours after notice of its arrival, after that time the liability will be only that of warehouseman. With these two exceptions the liability is that of a common carrier by the plain terms of the contract of shipment. The railroad company is permitted by law to make a reasonable contract as to the time allowed for removal of property from its cars after notice of arrival at its destination. The contract seems to be reasonable, and ought to be enforced as against the defendant company. The consignee has 48 hours in which to remove the property after notice of its arrival. If he does not remove it within that time he may still have the use of the car, but must pay demurrage, and the company's liability will be that of a warehouseman after the 48 hours have expired. The owner of the property may open the car for inspection, as in the Montana case cited, or for any other purpose. The liability of the company, by the express terms of the contract, does not depend upon opening the cars, or upon handling the goods, or unlocking or locking the car, or upon any other condition than removal of the property within the 48 hours. The discussion of such matters in the majority opinion seems to me to be wholly irrelevant. Of course, the owner of the property would be responsible for his own negligence which should

cause the loss or injury of the property. The majority opinion does not place the decision upon any consideration of negligence of the plaintiff which did or could cause the loss of the goods, but, as it seems to me, misconstrues a very plain contract.

ROSE, J., joins in this dissent.

ISAAC F. DOUGLASS, APPELLANT, V. CHARLES BURTON ET AL., APPELLEES.

FILED OCTOBER 30, 1915. No. 17947.

Bills and Notes: INNOCENT PURCHASER: DEFENSE OF WANT OF CONSIDERATION: BURDEN OF PROOF. Lack of consideration is no defense to negotiable papor in the hands of an innocent purchaser for value before maturity in the usual course of business, or in the hands of his transferee. Where such a defense is alleged, the burden of proof is upon the defendant to establish that the purchaser was not a purchaser in good faith.

REHEARING of case reported in 97 Neb. 483. *Former judgment of reversal adhered to.*

LETTON, J.

The facts in this case are set out in the former opinion. 97 Neb. 483. The note was executed before the negotiable instruments law took effect. A rehearing was allowed mainly to reconsider the evidence as to whether the banker, Ireland, from whom the plaintiff purchased the note, was a holder in due course before maturity. Of course, if this was so, then a purchaser from him, even after due, is entitled to the same protection and his title cannot be assailed.

The first question in this case is whether the banker, Ireland, had such knowledge. The defense being failure of consideration, the burden of proof was on the defendants to establish this.

We have repeatedly held that lack of consideration is no defense to negotiable paper in the hands of an innocent

purchaser for value before maturity in the usual course of business, and that the burden of proof, where such a defense is alleged, is upon the defendant to establish that the purchaser was not a purchaser in good faith. *Western Cottage Organ Co. v. Boyle,* 10 Neb. 409. This is followed in *Coakley v. Christie,* 20 Neb. 509; *Violet v. Rose,* 39 Neb. 660; *Kelman v. Calhoun,* 43 Neb. 157. It is also settled law that, where the defense interposed is fraud in the inception of the note, the burden is upon the plaintiff to prove that he is a *bona fide* holder for value. *Dobbins v. Oberman,* 17 Neb. 163; *Violet v. Rose,* 39 Neb. 660; *Kelman v. Calhoun,* 43 Neb. 157; *Lahrman v. Bauman,* 76 Neb. 846; *Norwood v. Bank of Commerce,* 77 Neb. 205; *Gibson v. Gutru,* 83 Neb. 718; *Central Nat. Bank v. Ericson,* 92 Neb. 396. The defendant failed to establish that Ireland had any knowledge of the transaction with defendants. In fact, it is not contended in the appellees' brief that Ireland had such knowledge, but it is argued that the jury were warranted in believing that Ireland had turned the note back to Burgess & Son, and that the plaintiff was in reality not acting for himself, but acting for them, when he brought this suit. We find no evidence in the record to establish this contention even by inference.

In *Ostenberg v. Kavka,* 95 Neb. 314, the notes were procured by fraud, and the burden was, therefore, upon the plaintiff to show he was a *bona fide* holder in due course. In this case there is evidence that the consideration failed, but none that the transaction was fraudulent. The burden of proof of bad faith on the part of Ireland was upon the defendants, and they failed to sustain it.

The former opinion was right and is adhered to.

JUDGMENT OF REVERSAL ADHERED TO.

HAMER, J., not sitting.

SEDGWICK, J., dissenting.

I think that, under the circumstances in this case, it was a question of fact for the jury to determine whether Ireland & Company bought this note in good faith, and

also whether this plaintiff is in fact the owner of the note. These facts are not fully recited either in the present or in the former opinion.

FAWCETT, J., concurs in this dissent.

ADOLPHUS F. LINTON ET AL., APPELLANTS, V. GEORGE SHELDON, APPELLEE.

FILED OCTOBER 30, 1915. No. 18316.

Contracts: RESCISSION. A contract procured by the intentional suppression or concealment of material facts touching the very substance of it by one party, which facts, if they had been disclosed, would have prevented the other party from entering into it, may be rescinded by the party deceived, and the guilty party is not entitled to its enforcement.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Charles Haffke and *Stout, Rose & Wells,* for appellants.

Sullivan & Rait, contra.

LETTON, J.

This action is brought to recover the sum of $1,800 alleged to be due plaintiffs upon a contract for the sale of 80 acres of land in Cass county by Adolphus F. Linton, Phœbe R. E. E. Linton, Charles S. Linton and Fryda S. Blessing to one Harshman. Adolphus and Phœbe Linton are husband and wife, and Charles S. Linton and Fryda S. Blessing are their adult children. It is alleged that the agreement was that the conveyance was to be in form sufficient to vest Harshman with the title to the land of which one Jane B. Finlay died seized, and to be of form approved by the Honorable John J. Sullivan; that the defendant who held a mortgage on the land, agreed with the plaintiffs to pay the sum stipulated in the contract; that the plaintiffs complied with all its terms and conditions,

and defendant refused to carry out the agreement and is liable for the contract price.

The answer pleads that the petition does not state a cause of action against Sheldon, and that if the plaintiffs have any remedy it is against Harshman. It also pleads that in 1887 Adolphus F. and Phœbe R. E. E. Linton conveyed the same land to Harshman by warranty deed, and that, by reason of a certain decree rendered in the United States circuit court for the western district of Pennsylvania and a conveyance made thereunder, the grantors had at that time a perfect title, which Harshman took. It is alleged that at the time the contract in suit was entered into the plaintiffs knew these facts, but fraudulently concealed and suppressed the truth, and falsely represented that the title was defective, and that Charles S. Linton and Fryda S. Blessing owned the fee subject to the life estate of their mother, Phœbe R. E. E. Linton; that Harshman and defendant were ignorant of the existence of this decree and conveyance when the contract was executed; that, as soon as this fact was ascertained, they notified the plaintiffs that the contract would not be performed. It also pleads that defendant acted in all things for Harshman, and undertook to advance the money only as his agent and for his benefit.

The reply pleads that there was an honest dispute as to the title, denies the allegations of fraud and concealment, and alleges that the contract was entered into as a compromise and settlement of the dispute.

At the close of the testimony each party moved for a directed verdict in his favor. This submitted the whole case to the trial judge for decision as to both fact and law. *Segear v. Westcott,* 83 Neb. 515; *Dorsey v. Wellman,* 85 Neb. 262; *Henton v. Sovereign Camp, W. O. W.,* 87 Neb. 552; *Martin v. Harvey,* 89 Neb. 173; *Adler v. Royal Neighbors of America,* 90 Neb. 56; *Fassler v. Streit,* 92 Neb. 786; *Fairbanks, Morse & Co. v. Austin,* 96 Neb. 137. A verdict was directed for defendant, and plaintiffs appeal.

In 1887 Phœbe R. E. E. Linton and Adolphus F. Linton, her husband, by their attorney in fact, J. B. Finlay, exe-

cuted in Pennsylvania a warranty deed to George W. Harshman to this 80 acres of land in Cass county, Nebraska. Harshman entered into possession under the deed, and was still in possession in May, 1910, when Charles Haffke, an attorney of Omaha, notified him that the owner of the land had placed in his charge the matter of securing possession of the property, saying in his letter: "This property was alleged to have been conveyed to you by J. B. Finlay, acting under an alleged power of attorney, which, however, was not a legal or valid conveyance, and the heirs are seeking to recover the possession of their land." In the meantime Harshman had executed a mortgage on the land to George Sheldon, the defendant. Negotiations ensued between the Lintons, represented by Mr. Haffke, and Sheldon, acting for Harshman, which resulted in the contract in suit, whereby the four Lintons agreed to sell and convey the land to Harshman, "conveyances to be in form sufficient to vest in the second party the title of which Jane B. Finlay, late of Kittanning Borough, Pennsylvania, died seized, and in form approved by Honorable John J. Sullivan, attorney of Omaha, Nebraska. * * * In consideration of such conveyances, the second party agrees to pay to the first parties the sum of $1,800 upon the delivery to and approval by said Sullivan of the form of deed of conveyance." This was signed by Haffke, as attorney in fact for the Lintons, and by Mr. Harshman. Sheldon did not sign. Mr. Haffke testifies that Mr. Sheldon was present at the time this contract was made, and said: "That he was going to advance the money for the purpose of taking up the contract, and afterwards, when I produced the deed in conformity to Judge Sullivan's request, and the deed which he had approved and left it in his hands, and when Mr. Sheldon left his check there, at that time Mr. Sheldon said he would pay the consideration price and left the check in Mr. Sullivan's hands for that purpose." Before the contract was entered into, and after an examination of the title of record in Cass county, Judge Sullivan made several requirements and conditions to the acceptance of a deed on behalf of his client. He required a deed

from the heirs of Grier C. Orr, trustee, a deed from Mr. Orr's successors in trust, and a warranty deed from the four Lintons, or else a judgment against the heirs of Grier C. Orr quieting the title of the Lintons to the property, in an action brought by the successor in trust of Orr and the Lintons, with a warranty deed, executed after the rendition of the decree, by the Lintons and the successor in trust, to the purchaser. He also required the will of Jane B. Finlay to be probated in Cass county. These requirements were communicated to Mr. Haffke. A deed signed by the Lintons was executed and delivered to Sullivan & Rait, who gave a receipt for the deed and power of attorney reciting they were held "pursuant to the contract between these parties and George W. Harshman. We have also check of George Sheldon for $1,800 for delivery to you when the said contract is carried out. (Signed) Sullivan & Rait." The check signed by Mr. Sheldon is payable to John J. Sullivan. This receipt is dated February 13, 1911. Instead of procuring conveyances from the trustee and Orr's heirs, Haffke took the other alternative, and proceeded to obtain a decree quieting title. A petition to quiet title was filed by him on March 27, 1911, and notice for service by publication begun. A few days before April 11, 1911, Haffke was notified on behalf of Harshman that he would not perform the contract, and on that day a letter was sent to him by Judge Sullivan definitely advising him to that effect. However, he went on with the suit, procured a decree, tendered performance of the contract, and demanded payment, which was refused.

It appears that in an action brought in 1882 in the United States circuit court for the district of Pennsylvania by Mrs. Linton and her husband against the heirs and executors of the estate of her father, James Brown, a deed from Mr. Brown, which conveyed to himself as trustee for Jane B. Finlay, his wife, during her lifetime, and to Mrs. Linton, his daughter, thereafter, all his lands in Nebraska, was declared to be a valid conveyance, and constituted Brown trustee for them as the deed purported. It was also

held that a later deed from Brown to Mrs. Finlay for life and to her children was of no effect. By her will Mrs. Finlay afterwards undertook to cut down the estate of Mrs. Linton to one for life merely, with remainder to her children, Charles and Fryda, and this is the instrument upon which the children rely as their immediate source of title. Lands in Douglas, Cass and Otoe counties in this state, as well as in other states, were conveyed by the Brown trust deed. The proceedings in the United States circuit court were made of record in Douglas county, but were not recorded in Cass county. After the contract was entered into Mr. Sheldon received a hint, and by diligent search learned the whole truth, and at once repudiated the contract. We are satisfied from the evidence that the Lintons were fully cognizant of all these facts and purposely concealed them from the defendant and Harshman at the time the contract was made, and that the contract would never have been entered into if they had been known. Without determining the question whether Mr. Sheldon is liable personally on an oral agreement to pay the money for Harshman, we take the broad ground that, without reference to whether Mr. Haffke knew or was ignorant of the state of the title at the time the contract was made, his principals, who are the plaintiffs in this case, were fully aware of all the facts, and took advantage of the fact that these documents affecting the title were not of record in Cass county, and that Harshman and his advisers were in the dark. Plaintiffs contend that the amount provided for by the contract was clearly the result of a compromise, was much less than the value of the interest of the Linton children, that the dispute was an honest one, made in good faith, and the settlement was to avoid litigation, and therefore there was ample consideration for the contract. This, no doubt, would be true if the facts had been disclosed and the parties stood upon an equal footing; but when by means of an intentional concealment of material facts touching the very substance of the transaction, which, if known to the other party, would have prevented him from making the agreement, one is induced to enter into

a contract and to assume obligations which he would not have assumed if he had known the truth, and he promptly rescinds upon knowledge of the true state of affairs, the guilty parties are not entitled to enforce such contract. Mr. Parsons says there are many cases in which the very propositions of a party imply that certain things, if not told, do not exist. The principle is stated as follows by Judge Gray in *Stewart v. Wyoming Cattle Ranche Co.*, 128 U. S. 383: "If, with the intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

We are convinced that the trial court properly determined the issues both of fact and law, and its judgment is therefore

AFFIRMED.

ROSE and HAMER, JJ., not sitting.

FRANK W. HAMPTON, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED OCTOBER 30, 1915. No. 18331.

1. **Master and Servant:** INJURY TO SERVANT: PLEADING AND PROOF. Where an injury is occasioned by risks which were obvious and known to the employee, if he relied upon the promise of his master to remedy dangerous conditions, he should plead those facts in his petition and prove them.

2. **Pleading:** INCONSISTENT PLEAS: APPEAL: WAIVER. Where the defendant goes to trial on the issues raised by the pleadings as a

whole, without attacking the reply on the ground that it is a departure from, or inconsistent with, the petition, and the issues thus raised are tried without objections, he will ordinarily be held on appeal to have waived those objections.

3. **Appeal:** CONFLICTING EVIDENCE. A finding of the jury upon conflicting testimony will not be set aside, if there is competent evidence to support it, unless clearly wrong.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

C. S. Allen and *Field, Ricketts & Ricketts,* for appellant.

C. S. Polk and *W. B. Comstock, contra.*

ROSE, J.

This is an action to recover damages in the sum of $10,400 for injuries alleged to have been sustained by plaintiff while in the employ of defendant. From a judgment for plaintiff in the sum of $3,600, defendant has appealed.

At the time of the accident plaintiff was employed at night, with eight or ten other men, as a car-repairer in the car barn of the defendant in Lincoln. There were a number of tracks six feet apart running into the barn from the south entrance and reaching to the north end. Between the tracks were wooden platforms running the entire length of the barn, except between tracks 4 and 5 at the north end. The platform between these tracks ended about 15 feet south of the north side of the barn. Underneath the tracks was a pit about four feet deep. Across tracks 4 and 5 and the space between, at the north end, there was a plank about 14 feet long and 12 inches wide. This was used by the workmen in passing along the north end of the building to and from the different cars. Plaintiff in his petition alleged that the place was insufficiently lighted, that the board over which he was compelled to pass was unsafe, and because of defendant's negligence in failing to furnish him a safe place to work, December 24, 1909, while engaged with another employee in carrying a controller along the plank to a car on track 4, he fell astride a rail, crushing and injuring his left testicle to

such an extent that its removal subsequently became necessary, the fall also resulting in a hernia. The answer admitted the incorporation of defendant, and denied every other allegation of the petition, and alleged that the injury, if any, was due to plaintiff's own negligence, and to risks which were obvious and the danger of which plaintiff assumed. An amended reply alleged that on or about December 14, 1909, plaintiff and other workmen had complained to the foreman about the insufficient lighting and the dangerous platform provided, and that they were promised that conditions would be remedied, and that plaintiff relied upon these promises and continued to work, but that conditions were not improved at the time of the injury.

The first assignment of error argued is that the petition fails to state a cause of action, and that plaintiff cannot recover upon the allegations of the reply. The rule has been stated as follows:

"A servant assumes the ordinary risks arising from the manner of conducting the master's business, in which he is to take part, and from the appliances used therefor, when such risks are known to him, or are apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment, or continues in it without complaint or objections to the hazards; the presumption in such case is that such risks have been assumed by him, and in order to recover for injuries caused thereby the burden is upon the plaintiff to establish an exception to the rule." *Glantz v. Chicago, B. & Q. R. Co.*, 87 Neb. 60.

Under this rule the servant "must not only prove, but he must plead, the facts which create an exception to the rule—as, for instance, that, on complaint to the master, a promise was made to remove the defect and the machinery was used relying upon that promise." *Malm v. Thelin*, 47 Neb. 686. See, also, *Missouri, P. R. Co. v. Baxter*, 42 Neb. 793.

The cause of action should be stated in the petition, and not in the reply, but "where defendant goes to trial on

the issues raised by the pleadings as a whole, without attacking the reply in any form on the ground that it is inconsistent with the petition or that it changes the cause of action, it may be held on appeal that he waived those objections." *Lowe v. Keenes,* 90 Neb. 565.

In this case no objection was made to the reply. Objection was made to questions relating to complaints of the insufficiency of the lighting and of the platform, on the grounds that no foundation was laid, and that such questions called for incompetent, irrelevant and immaterial testimony. Defendant was apprised of the grounds of plaintiff's action, but made no objection to the manner of pleading. Under these facts the following provision of the statute is applicable:

"The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Rev. St. 1913, sec. 7713.

The issue as to the promise to repair was in fact tried, and the judgment will not be reversed, under the circumstances, for the irregularity in the pleadings.

Defendant contends that the evidence is insufficient to sustain the verdict, but when all of the testimony is considered, with the inferences which may properly be drawn therefrom, it cannot be held on appeal that actionable negligence was not shown.

Error in the giving and refusing of instructions is assigned, but, under the circumstances no prejudicial error in these respects is shown.

AFFIRMED.

LETTON, J., not sitting.

BANK OF MILLER, APPELLANT, V. THOMAS E. MOORE ET AL., APPELLEES.

FILED OCTOBER 30, 1915. No. 18333.

1. **Judgment: REVIVOR: FORUM.** The forum for the revival of a dormant judgment of a district court is the court of original jurisdiction, and an attempted revival in another district court to which the judgment has been removed by transcript is void.
2. **Creditors' Suit: BASIS: DORMANT JUDGMENT.** As a general rule a dormant judgment cannot be made the basis for a creditor's bill.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Fred A. Nye and *John A. Miller,* for appellant.

W. D. Oldham, contra.

ROSE, J.

This is an action in the nature of a creditor's bill to subject to the payment of a judgment in favor of plaintiff and against defendant Thomas E. Moore the interest of the latter in a trust estate created by the will of his deceased wife. From a dismissal of the bill, plaintiff has appealed.

In reply to the arguments of plaintiff in favor of granting equitable relief, Moore insists that the bill was properly dismissed, because the judgment pleaded and proved is dormant. This defense seems to be established. The judgment was rendered in the district court for Buffalo county July 7, 1894. It has not been revived therein, and has not been kept alive by the issuance of executions from that court. A transcript of the judgment, however, was filed in the district court for Dawson county, where a revivor was entered October 25, 1906. Upon this order plaintiff relies, but it did not give vitality to the dormant judgment, because the district court for Dawson county was without jurisdiction to enter it, the forum for that purpose

being the court of original jurisdiction. *Case Threshing Machine Co. v. Edmisten,* 85 Neb. 272. Proof of an enforceable judgment is necessary to relief under the creditor's bill. *Holmes v. Webster, ante,* p. 105. Since the bill was properly dismissed for the reasons stated, it is not necessary to consider other questions presented.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

OMAHA NATIONAL BANK, APPELLEE, V. H. B. GRAHAM, APPELLANT.

FILED OCTOBER 30, 1915. No. 18310.

Pleading: AFFIRMATIVE DEFENSE: BURDEN OF PROOF. Where the answer admits the material allegations in the petition, and pleads an affirmative defense thereto, the burden is upon the defendant to establish such defense by a preponderance of the evidence.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Brome & Brome and *Westerfield & Crossman,* for appellant.

Stout, Rose & Wells, contra.

FAWCETT, J.

This suit was instituted in the district court for Douglas county, to recover on a promissory note executed by defendant, and for the foreclosure and sale of certain stock in two corporations, pledged as collateral security for the payment of the note. The pledge was in writing and contained an express power of sale. The consideration for the note was a loan of money to the full sum named in the note. Plaintiff was granted the relief prayed. Defendant appeals.

The answer admits the execution of the note and delivery of the collateral, and then pleads an affirmative de-

fense, based upon transactions which defendant alleges he had with W. H. Bucholz, who at the beginning of the transactions was cashier, but later on became vice-president, and during all of the time was one of the directors and managing officers of plaintiff.

It would avail nothing to set out even the substance of the pleading, as defendant has failed to establish the facts alleged, by a preponderance of the evidence, the burden of doing which was upon him. This being the condition of the record, the question of the sufficiency of the facts alleged, if proved, to constitute a defense becomes immaterial. We concede that it is our duty to consider the case *de novo* and to reach an independent conclusion without reference to that reached by the trial court. This we have done, and, if the record were before us as an original case, we would be forced to the same conclusion as that reached by the trial court.

It follows that the judgment of the district court must be, and it is

AFFIRMED.

ROSE and HAMER, JJ., not sitting.

EDYTHE LARSON ET AL., APPELLEES, V. CENTRAL NATIONAL FIRE INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 30, 1915. No. 18352.

1. **Appeal: PLEADING: IMMATERIAL MATTER.** Where a petition alleges matter clearly immaterial to the real issue in the case, and the defendant, instead of moving to strike such immaterial matter, specifically answers thereto, it is not error to strike such immaterial matter from the answer, and, in the absence of a motion so to do, fail to also strike the immaterial matter from the petition; and the admission of evidence to support such immaterial matter in the petition will not constitute reversible error, unless it appears from the record that defendant was prejudiced thereby.

2. **Insurance: APPEAL: SUFFICIENCY OF EVIDENCE.** The evidence examinod, and set out in the opinion, *held* sufficient to sustain the verdict.

3. ———: ———: PROOFS OF LOSS: SUFFICIENCY OF EVIDENCE. The evidence as to the furnishing of proofs of loss, set out in the opinion, examined, and *held* sufficient to show that such proofs of loss were furnished.

4. **Appeal:** RULINGS ON EVIDENCE. Rulings of the trial court on the admission or exclusion of evidence are largely within the discretion of the court, and error in such rulings is not ground for reversal, unless it appears from the record that the party complaining was injured thereby.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

John C. Watson and *Max M. Cohn,* for appellant.

Fred P. Marconnit and *Livingston & Heinke, contra.*

FAWCETT, J.

From a judgment of the district court for Otoe county, in favor of plaintiffs, for loss and damage by fire to a stock of merchandise, defendant appeals.

The petition is substantially in the usual form in an action upon a fire insurance policy for loss and damage by fire. There is this difference: The petition alleges that on July 9, 1912, plaintiffs, having made an agreement to sell the stock of merchandise to one Blanche Ball, obtained from defendant's agent a policy in the name of Miss Ball for $1,700; that Miss Ball failed to complete her contract for the purchase of the stock, and thereupon plaintiffs surrendered the policy issued in her name to defendant's agent, and obtained in lieu thereof a policy to themselves for the same amount. In its answer defendant specifically answered the allegations of the petition in relation to the transaction with Miss Ball. On motion of plaintiffs that portion of defendant's answer was stricken. This is assigned as error. The court should have stricken this part of the answer, and also the paragraphs of the petition to which it related, as neither the allegations of the petition nor that portion of the answer relating thereto were in any manner material to the real issue in the case, which must stand or fall upon the second policy issued to plain-

tiffs themselves. As this entire portion of the pleadings was immaterial and irrelevant, we do not think error can be predicated on any action of the court in relation thereto.

The answer of the defendant, with the allegations in relation to the Ball policy eliminated, pleads but two defenses: First, a general denial of every allegation in the petition not specifically admitted; and, second, that at the time plaintiffs obtained the policy in suit, which the defendant alleges was on July 22, 1912, they knowingly, falsely and fraudulently represented to the agent of defendant that the stock of merchandise, upon which the insurance was desired, was of the value of $2,500, that the stock was of the value of not to exceed $300, and that by reason of such fraud and false statements the policy of insurance was and is wholly void. The reply was a general denial.

The brief of defendant contains a large number of assignments of error, but under the well-settled rule in this court we will consider only those argued. The first point argued is the alleged error of the court in striking the two paragraphs of the answer above referred to. What we have already said disposes of that contention. The next point is the insufficiency of the evidence as to the value of the property destroyed and damaged. The evidence upon this point is quite meager. It depends upon the testimony of plaintiff Edythe Larson. She testified that she knew the value of the stock. "Q. Just tell the jury what the value of it was. A. Well, we considered it worth between $1,800 and $1,900 cash." She then explained that she meant the wholesale price. "Q. You mean to say that this stock, without the freight or expressage added, was worth somewhere from $1,800 to $1,900? A. Yes, sir; there was a mistake made in the invoice of $100. There was some braid and some things that were never invoiced. They were worth, I should judge, between $35 and $50." Two witnesses were introduced by defendant on the question of value, but all they knew about the stock was what they could see upon making an examination after the fire. They

were unable to state the quantity of goods on hand when the fire occurred. One of the witnesses testified that portions of the stock which she saw were somewhat out of style, and gave it as her estimate that the stock for this reason would be depreciated 50 per cent. The other witness testified that the spring hats were in style; that everything was burned and damaged. She did not testify as to any depreciation. The jury returned a verdict for $1,000. In the light of this testimony, which is not as clear as it seems to us it might have been made, we cannot say that the evidence is insufficient to sustain the verdict. The allegation that plaintiffs, at the time they obtained the policy in suit, fraudulently represented the value of the property is not sustained by the evidence.

The next point urged is that plaintiffs failed to prove the furnishing by them, or waiver by defendant, of proofs of loss. In their petition plaintiffs pleaded that on July 29, which would be six days after the fire occurred, a general agent or adjuster of the defendant visited Nebraska City and inspected the loss, and at that time fraudulently and surreptitiously gained possession of the policy and carried it away with him, and that since that time the policy has been continuously in the possession of the defendant, and for that reason plaintiffs could not set out a copy thereof in their petition. The answer of the defendant fails to plead the terms and conditions of the policy. We are therefore not advised by the pleadings as to whether or not the policy stipulated that furnishing of proofs of loss should constitute a condition precedent to an action thereon for any loss sustained. Waiving that point, and assuming that the policy did contain such a stipulation, defendant's point must fail, for the reason that the petition alleges that plaintiffs furnished notice and proof of the loss of the goods insured to the defendant, and the testimony of plaintiff Edythe Larson is that proofs of loss were sent by plaintiffs to the defendant to its Chicago office. This testimony is not contradicted, nor is there pleading or proof offered by defendant that the proofs were not re-

ceived, that they were insufficient, or that they were not furnished in due time.

It is next urged that the jury by the verdict allowed an attorney's fee. This is not sustained by the record. It is next urged that the verdict was a "quotient verdict." There is nothing in the record to sustain this contention. A number of assignments are directed against rulings of the court in the admission and exclusion of evidence. We will not enter upon a discussion of these assignments, for the reason that some of the rulings assailed were proper, and others, while not strictly proper, were not of a character that could in any manner have prejudiced the defendant. It is next urged that the court erred in its first instruction to the jury in stating the amount for which plaintiffs prayed judgment, and in adding "and a reasonable attorney's fee for the services of their attorneys herein, to be determined by the court." That could not have prejudiced the defendant, as it expressly withheld from the jury the determination of that question, and the journal entry of the judgment shows that even the court did not allow any attorney's fee.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

ANNA E. BURKE, APPELLEE, V. HOMER H. NORTHUP ET AL., APPELLANTS.

FILED OCTOBER 30, 1915. No. 18380.

1. **Appeal: PLEADING: SAME CAUSE OF ACTION.** The petition filed in the district court, set out in the opinion, examined, and *held* to state the same cause of action as that set out in the bill of particulars in justice court.
2. ———: ———: ———: **CHANGE OF ISSUES.** *Myers* v. *Moore*, 78 Neb. 448, and *North & Co. v. Angelo*, 75 Neb. 381, *held* decisive of the case at bar.

APPEAL from the district court for Furnas county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John Stevens, for appellants.

Lambe & Butler, contra.

FAWCETT, J.

From a judgment of the district court for Furnas county, in an action for money had and received, defendants appeal.

The case originated in justice court. Plaintiff recovered in that court, and defendants appealed to the district court. The controlling question here is: Does plaintiff's petition in the district court state a different cause of action from that stated in the bill of particulars in justice court?

The bill of particulars alleged that defendants were doing business as real estate brokers; that they falsely and fraudulently, and with intent to deceive and defraud plaintiff, represented that they were authorized and had the power to sell lots 4, 5 and 6, in block 14, Colvin's addition to Arapahoe, and by reason of their representations induced plaintiff to deposit with them a certificate of deposit of $175, which certificate they promised and agreed to hold until the title deeds to the property, with abstract showing clear title to convey, could be obtained; that the defendants wrongfully and fraudulently converted the deposit into cash and appropriated the same to their own use; that thereafter they returned to plaintiff $75 of the amount, but have failed and refused to pay over the balance, and have failed and refused to deliver to plaintiff the title deeds as agreed.

The petition alleges that defendants were real estate brokers in Arapahoe; that, assuming to act as agent for one Houser, they induced plaintiff to enter into a contract of purchase of the same three lots, set out in the bill of particulars; that the contract provided that the property should be conveyed to plaintiff in fee simple, clear of all incumbrances, by good and sufficient warranty deed; the

consideration to be paid; that after signing the agreement plaintiff delivered to the defendants a certificate of deposit for $174.50, payable to the order of A. L. Burke, husband of plaintiff; that the husband gave to defendants a written check on the Bank of Maywood for $174.50; that the certificate of deposit and the check were delivered to defendants on the express oral agreement that defendants would deposit the certificate, or check, together with the contract, with the Arapahoe State Bank, the same to be held by the bank until defendants, or Houser, executed and delivered a warranty deed for the lots described and an abstract showing clear and merchantable title; that, upon their so doing, the certificate of deposit, or check, was to be then cashed and the money derived therefrom applied on the purchase price of the lots; that, in case the defendants failed to procure the abstract, showing merchantable title, and warranty deed within a reasonable time, the certificate of deposit and check were to be returned to the plaintiff; that, upon learning what defendants had done, Houser repudiated the contract, and that neither the defendants nor Houser ever tendered to plaintiff a deed or abstract, though the plaintiff had at all times been able and willing to comply with the terms thereof; that, contrary to the express oral agreement, defendants, upon receiving the certificate of deposit, or check, instead of depositing the same with the bank, immediately indorsed and cashed the certificate of deposit, or check, and appropriated the same to their own use; that subsequently they refunded $75 of the amount so appropriated, but have failed and refused to pay the balance.

We cannot agree with counsel for defendants that there was any change in the cause of action. The bill of particulars and petition are both based upon the fraudulent representations made by defendants in obtaining the certificate of deposit, their breach of good faith in cashing the same and appropriating the proceeds to their own use, and their failure to either deliver up the certificate of deposit and check, as agreed, or to refund the proceeds thereof. The simple fact that in the amended petition the facts upon

which their cause of action for the $100 had and received are more fully stated, does not constitute a change of cause of action. It is conceded that the action as originally instituted in the justice court was within the statute of limitations. The meaning of the phrase, "cause of action," is clearly and correctly stated in the fourth paragraph of the syllabus in *Myers v. Moore,* 78 Neb. 448, and *North & Co. v. Angelo,* on rehearing, 75 Neb. 381, states the rule as to change of issues. Those two cases are decisive of this.

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

IN RE ESTATE OF WILLIAM W. WILSON.
STEPHEN E. COZAD, ADMINISTRATOR, ET AL., APPELLANTS, V. CORA M. HIBNER, EXECUTRIX, APPELLEE.

FILED OCTOBER 30, 1915. No. 18830.

1. **Executors and Administrators: FINAL ACCOUNT.** Although notice has been given of final settlement of an estate in probate, and orders are made thereon determining the heirs and fixing their interests and adjusting certain uncontested items of the administrator's account, orders so adjusting items of the account will not be regarded as final, if the administrator is not discharged, and additional collections and disbursements by him are required and a further report necessary.

2. ———: APPEAL: MODIFICATION OF JUDGMENT. An item of charge, $511.72, against the administrator by our former decision (97 Neb. 780), is found to be erroneous, and our judgment is corrected accordingly.

REHEARING of case reported in 97 Neb. 780. *Reaffirmed as modified.*

SEDGWICK, J.

After our former opinion in this case (97 Neb. 780) a rehearing was allowed, and in additional briefs and further oral argument it was contended that the order of the probate court of January, 1906, on the report of the administrator was a final decree, and not merely interloc-

utory as held in our former opinion. The argument is that, as notice had been given of final settlement of the estate, the order at such hearing must be final in all particulars. But the effect of the order must be determined from the order itself, and it does not purport to be a final adjudication of the accounts of the administrator. The items of his general accounts now in question were not contested by these parties and specifically determined upon that hearing. The administrator was not discharged. It provided that the administrator should transact further business as such administrator, receive and pay out funds, and "upon making a report of his doings under this decree, with receipts attached from said heirs and filing the same in this court as final vouchers for the balance of the money so paid out, and upon approval by the court of his said report, that said administrator will be discharged from his said trust and his bondsmen released from further liability." This was not a final decree as to the accounts of the administrator.

In our former opinion it was said: "In the supplemental report of 1911, which was duly appealed from, the court allowed the administrator fees for attorneys employed by him in the contest between himself and the estate." It was considered that such attorneys' fees ought not to have been allowed the administrator, and a part of the modification of the judgment of the district court was to add to that judgment $511.72 on account of such attorneys' fees improperly allowed. It is contended upon the rehearing that this item was not allowed in the district court, and we do not understand that the plaintiff contends that, in fact, the district court did allow this item. It was therefore an error to add that amount to the charges against the administrator as fixed by the district court, and our former judgment is modified accordingly. In all other respects our former judgment is adhered to.

REAFFIRMED AS MODIFIED.

LETTON, J., took no part in the decision.

HAMER, J., not sitting.

STATE, EX REL. JOHN FITCH, APPELLEE, V. SAMUEL R. MCFARLAND, COUNTY CLERK, ET AL., APPELLANTS.

FILED OCTOBER 30, 1915. No. 19025.

1. **County Commissioners: TERM OF OFFICE.** The official term of the office of county commissioner in counties not under township organization is four years. By the act of 1913 (Laws 1913, ch. 149, sec. 17, Rev. St. 1913, sec. 1955) it is provided that in counties having three commissioners two shall be elected in the year 1914 for a term of four years and one in 1916 for a term of four years.
2. ———: **ELECTION: VALIDITY: NOTICE.** The failure to give the statutory notice of election of county commissioner will not of itself invalidate an election. But, if it appears that such failure has prevented the electors generally from voting upon a question, it cannot be held that there has been an election upon that question.

REHEARING of case reported, *ante*, p. 198. *Former judgment of reversal and dismissal adhered to.*

SEDGWICK, J.

By our former decision in this case, *ante*, p. 198, the judgment of the district court was reversed and the action dismissed. The nature of the case is there stated.

It appears that in Madison county a commissioner had been elected for the first commissioners' district in 1905, 1908 and 1911. The statutes, and perhaps some of the court decisions, were in confusion, and the officers and people of Madison county considered that the term of office of county commissioner in counties not under township organization and having three commissioners was three years. At that time the general election law contained the provision: "One county commissioner shall be elected annually, who shall serve three years." Laws 1911, ch. 43. This clause should be disregarded, for the reasons stated in *Saling v. Bahensky*, 97 Neb. 789, but it tended to mislead many county officials. The term of this office is four years. *Best v. Moorhead*, 96 Neb. 602; *Saling v. Ba-*

hensky, supra; Calling v. Gilland, 97 Neb. 788. The election is held in the even numbered years. In the act of 1913 the above quoted clause was omitted from the election laws, and it was definitely provided: "Two commissioners shall be elected in the year nineteen hundred and fourteen and every fourth year thereafter, and one commissioner shall be elected in the year nineteen hundred and sixteen and every fourth year thereafter." Laws 1913, ch. 149, sec. 17 (Rev. St. 1913, sec. 1955). This change expressed the legislative construction of the former conflicting statutes, and two commissioners should have been elected in Madison county in 1914. This change in the statute was overlooked in *Best v. Moorhead, supra.* Mr. Purdy had not been elected for any term allowed by law, and was therefore an officer *de facto,* and as such will hold until the next election, when his successor will be elected for the remainder of the term, which expires in January, 1917.

The question is: Was there an election held for county commissioners in the first district of Madison county in the year 1914? It is conceded that there was no official notice of such an election. If, however, an election should have been held at that time, and was in fact held, it could not be disregarded because of a failure to give the official notice. This was definitely determined in *State v. Skirving,* 19 Neb. 497. The law is stated in the syllabus: "Where a vacancy occurs in the office of county commissioner more than thirty days before a general election, it is to be filled thereat; and the failure of the county clerk to call attention to such vacancy in the election notices posted by him, where the fact is generally known and acted on by the voters of the county, will not invalidate the votes cast to fill said vacancy." The opinion recites that the highest number of votes cast at the election in question was 3,124, and that 2,989 votes were cast for the candidates for the particular office in question, and adds: "This shows that it was generally understood in that county that a vacancy existed, and that the candidates named were balloted for to fill said office." This question as to what really constitutes an

election is again considered in *State v. Thayer,* 31 Neb. 82. In the opinion it is said, with approval, that in Michigan it is held that "statutory provisions for the conduct of elections are directory only, excepting they be of the character that a failure of strict compliance would prevent or obstruct the free and complete expression of the public will, or satisfactory evidence to that effect." It appears from the opinion that the votes cast for the office of judge of the sixth judicial district at the election there in question were 12,455, of which the relator received 7,612, and that there were only 279 voters at the election that failed to vote upon that question. In the case at bar (as appears from those parts of the return which were stricken out by the court, and which must therefore now be regarded as true) the county officers considered that no election was to be held for the office in question; no such office was included in the ballot at the primary election, and no nomination made thereat. No such office was named on the election ballot, and no blank space was left for inserting the name of any candidate for such office. There were more than 4,000 voters in Madison county, and 3,621 voted at the general election in 1914. One hundred five voters wrote the name of the relator on the ballot and voted for him. Two other voters appear to have expressed a choice for this office. In only 5 out of 25 precincts of the county were any votes cast for county commissioner. It appears to have been notorious that the county officers had declared that there was to be no election of county commissioners at that election, and from the votes cast it is manifest that it was generally so understood. The authorities generally are that such a proceeding does not constitute an election, and the opinions in *State v. Thayer, supra,* and *State v. Skirving, supra,* indicate clearly that such proceedings could not be held to constitute an election in this state.

The relator suggests that the action of the county officers, in declaring that there would be no election of county commissioners at that election, and in refusing to provide for such election, was resisted by some, and that a political committee declared that there would be such an elec-

tion and caused this declaration to be published in certain papers. This would tend to show notice to the electors and might arouse some interest among them. Such evidence is entirely overcome by the other circumstances, and by the fact that so few participated in the election.

The conclusion of our former opinion is therefore right, and is adhered to.

JUDGMENT ADHERED TO.

HAMER, J., not sitting.

ISOM H. DE LARM, APPELLANT, V. VICTOR VAN CAMP, COUNTY CLERK, ET AL., APPELLEES.

FILED OCTOBER 30, 1915. No. 19120.

1. **County Commissioners: TERM OF OFFICE.** By the act of 1913 (Laws 1913, ch. 149, sec. 17, Rev. St. 1913, sec. 1955) it is provided that in counties having three commissioners two should be elected in 1914 for a term of four years and one in 1916 for a term of four years.
2. **———: TIME OF ELECTION.** The said act was a legislative construction of former conflicting statutes, and establishes that subsequent to the act of 1905 (Laws 1905, ch. 46) and the amendment of the Constitution (Const., art. XVI, sec. 13) no valid election could be held in such counties in the odd numbered years. *State v. McFarland, ante*, pp. 198, 854.

APPEAL from the district court for Boone county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

H. C. Vail, for appellant.

Albert & Wagner, contra.

SEDGWICK, J.

The relator brought this action in the district court for Boone county to restrain the county clerk from issuing respondent Tisthammer's certificate of election as county commissioner for the third district of Boone county, and to restrain the other county commissioners from recogniz-

ing respondent as a member of the board. The district court refused the injunction and dismissed the suit. Relator has appealed.

The principal questions presented in this case are decided in *State v. McFarland, ante,* pp. 198, 854. By the statute of 1905 the term was established at four years, and by the constitutional amendment the election must be on the even years. Considering the statute in the light of the constitutional amendment, the official term of four years would begin in January, after the election of 1906. Mr. Berg was holding the office in 1906, and until January, 1907, must be regarded as filling the term that expired at that time. From January, 1907, he must be considered as holding over into that term; he held over until January, 1909. The relator then took the office and held it for the remainder of the legal term, which ended January, 1911. He also held over for a part of the legal term which ended January, 1915. At the general election of 1914 the respondent Tisthammer was elected for the legal term beginning January, 1915, and was entitled to hold the office for that term, ending January, 1919. The court did right, and it is not necessary to determine whether in such case injunction is the proper remedy.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

BARNEY GILINSKY, APPELLEE, V. ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT.

FILED OCTOBER 30, 1915. No. 18268.

1. Carriers: DELAYED SHIPMENT: ACTION FOR DAMAGES: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to sustain the judgment for damages on the issue of negligence, in the shipment of a car of bananas.

2. ———: ———: ———: DEFENSES: WAIVER. Provisions of a bill of lading requiring written notice of damage to be given to the

carrier and fixing a time less than that fixed by the statute in which action shall be commenced, in order to be available as defenses, must be pleaded as such, otherwise they are deemed waived.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

William Baird & Sons and *Helsell & Helsell,* for appellant.

Baldrige, Keller & Keller, Blewett Lee and *W. S. Horton, contra.*

MARTIN, C.

The plaintiff refused to receive a car-load of bananas, and brought suit against the Illinois Central Railroad Company as the initial carrier for the value of the bananas, which were shipped by the Fruit Dispatch Company from New Orleans, Louisiana, to Council Bluffs, Iowa. The petition alleged that the bananas were shipped in good condition, and should have reached their destination in about 70 hours, whereas, through the negligence of the carrier, they were loaded in an old and broken car, which was detained for repairs, and that the shipment was made by a circuitous route, and when the car arrived, having been on the way about six days, the bananas were practically worthless. The railroad company denied the allegations of the petition, and affirmatively alleged that, in the event it is proved that it received the car of bananas for transportation, the same was transported under the care and control of the agents of the consignee, and that, if any damage accrued to the bananas, the same was due to the negligence of the plaintiff's agents. There was a reply in the nature of a general denial. The plaintiff had a verdict of the jury and judgment for the sum of $904.50. The railroad company has appealed to this court.

The evidence shows that there was unnecessary delay in the shipment, and amply sustains the judgment. The plaintiff claims that the action is one for negligence sounding in tort. The defendant contends that it is an action on

contract, and that, the shipment being from one state to another, was made under a bill of lading within the contemplation of the interstate commerce act.

The Carmack amendment of June 29, 1906 (34 St. at Large, ch. 3591, p. 584) to section 20 of the interstate commerce act of Feb. 4, 1887 (24 St. at Large, ch. 104, p. 379) requires a common carrier shipping property from one state into another to issue a bill of lading therefor, and makes such carrier liable to the holder thereof for any damage or loss to such property caused by it or by any common carrier to which such property may be delivered; and no contract shall exempt such carrier from such liability. Said amendment also enables the initial carrier to recover from any common carrier, on whose line any damage to such property has been sustained, the amount of such damage or loss as such initial carrier may be required to pay to the owner of such property. Said amendment reserves to the holder of such bill of lading any remedy or right of action which he has under existing law.

In *Adams Express Co. v. Croninger*, 226 U. S. 491, it was held that congress by the Carmack amendment intended to adopt a uniform rule as to the liability imposed upon interstate carriers by state regulations of bills of lading, and to relieve such contracts from the diverse regulation to which the various states had made them subject, and that this legislation supersedes all regulations and policies of the state upon the same subject matter. It was also held in the above case that a provision in the bill of lading limiting the liability of the carrier to an amount not exceeding the value of the property stated by the shipper, when made as a consideration for a lower rate, was not in violation of the act and such limitation was enforceable. This we take it is the extent of that decision.

In the case at bar a purported bill of lading was introduced in evidence. The plaintiff contended that it was introduced for the purpose of showing the routing of the car and possession of the bananas in the carrier. None of its provisions appeared in the pleadings, and there is doubt of its genuineness.

Even if we assume that this bill of lading was regularly issued and its terms enforceable as against plaintiff, all these matters under the procedure of this state were affirmative defenses. None of them were pleaded. The petition did not set out the bill of lading and the answer did not refer to any of these defenses. *Railway Officials & Employees Accident Ass'n v. Drummond,* 56 Neb. 235.

"Where a carrier sued for delay in shipment failed to allege in its answer the existence of a special contract limiting its liability, a defense based upon such contract will be treated as waived." *Kansas City, P. & G. R. Co. v. Pace,* 69 Ark. 256. See, also, *Union P. R. Co. v. Thompson,* 75 Neb. 464; *Cook v. Chicago, R. I. & P. R. Co.,* 78 Neb. 64.

We recommend that the judgment be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

IN RE JOSEPH DE KLOTZ.
JOSEPH DE KLOTZ, APPELLEE, V. GUS A. HYERS, SHERIFF, APPELLANT.

FILED DECEMBER 3, 1915. No. 18391.

Statutes: LEGISLATIVE CLASSIFICATION. A legislative classification, in order to be valid, must not be artificial, arbitrary and unreasonable.

Opinion on motion for rehearing of case reported, *ante,* p. 140. *Former judgment of reversal set aside, and judgment of district court affirmed.*

LETTON, J.

Rehearing of *In re De Klotz, ante,* p. 140. This case was submitted with *In re Arrigo, ante,* p. 134, and *In re Indovina, ante,* p. 140, and in the former opinion it was stated that the disposition of the case was controlled

by the *Arrigo* case. In that case it was held that the legislature had power to provide that a package of food products in which a gift or prize was placed should be deemed to be misbranded. Our attention now being called specially to the evidence, it is believed that there is a distinction between the facts in the cases mentioned and those in this case. In the case at bar the only thing that was placed within the package was a narrow slip of thin paper with the printed statement: "This coupon will be accepted by us, with others, in full payment for the many beautiful and costly articles described in our handsomely illustrated catalogue upon conditions stated thereon." A short statement substantially to the same effect was printed on the back. In the case of *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, it was held that the giving by a merchant of a discount or rebate upon the price of his goods through the medium of a stamp or coupon was not unlawful in this state, notwithstanding the act known as the "Gift Enterprise Law." Laws 1911, ch. 179. If the slip of paper had not been placed in the package, it would not have been unlawful to give it to the buyer. At the trial the state chemist testified that the placing of the slip or coupon in the package did not in any way affect the wholesomeness of the food. It is practically unappreciable in weight. In the other cases certain toys had been placed in the packages in contact with the food, and it was held that the statement of net weight of contents upon the package left it uncertain whether the stated weight was that of the food alone, and, since it was the legislative purpose that the label should clearly indicate the net weight of the food contents, a package which failed to disclose the same might properly be described as being misbranded. It was further held that, since the included gifts and prizes might come from germ-laden sources, not subject to inspection by qualified officers under the pure food act, the legislature might properly prohibit the inclusion of such objects in a package of food and declare such a package misbranded.

But there is no prohibition in the statute upon the placing of advertising matter in a food package. In fact, common experience shows that many packages of food products contain printed matter advertising either the included product or other articles sold by the same manufacturer or jobber. Ordinarily there can be no distinction with respect to weight or healthfulness between printed slips of paper. There seems to be no reasonable basis of classification which will permit a package to be declared misbranded which contains one form of printed slip, and another package not misbranded when it contains a like printed slip of paper, merely because its words convey a different meaning. Such an artificial distinction cannot legally be made. The former opinion is therefore set aside, and the judgment of the district court affirmed.

JUDGMENT ACCORDINGLY.

HAMER, J., not sitting.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT, V. BRIDGES, HOYE & COMPANY, APPELLEE; LION BONDING & SURETY COMPANY, APPELLANT.

FILED DECEMBER 3, 1915. No. 18890.

1. **Insurance: ACTION: ATTORNEY'S FEES.** By the act of 1913 (Laws 1913, ch. 154, sec. 1; Rev. St. 1913, sec. 3137), any company or person that engages in the business of apportioning and distributing losses arising from specified causes, among all those who apply and are accepted to receive the benefits of such service, engages in a business of public character. The statute classifies such business as insurance, and provides at large for the regulation and supervision of such business. In actions upon contracts of indemnity by companies authorized under the statute, "the court upon rendering judgment against such company or person shall allow the plaintiff a reasonable sum as an attorney's fee, in addition to the amount of his recovery, to be taxed as part of the costs." Rev. St. 1913, sec. 3212.

2. ———: ———: ———. In such case it has been determined in this state that attorney's fees to be so taxed as costs relate only to

the remedy, and are to be so taxed without regard to whether the contract sued upon was entered into before or after the enactment of the statute.

Opinion on motion for rehearing of case reported, *ante*, p. 27. *Former judgment modified.*

SEDGWICK, J.

Upon motion to modify our former opinion, *ante*, p. 27, additional briefs were filed by both parties, and two questions are presented for further consideration: (1) Was the relation of the defendant Lion Bonding & Surety Company to this transaction that of an insurer, within the meaning of our statute providing for the allowance of attorney's fees? (2) If so, does that statute apply to insurance issued before the statute took effect?

1. Upon the first question it was said in the former opinion: "It appears to be conceded that the bond upon which these actions are brought is, as between the school district and the contractor, within the terms of this statute." The defendant contends that the point was not conceded, and presents a vigorous and interesting argument on the proposition that this class of contracts is not included in the statute. The first section of the act of 1913 (Laws 1913, ch. 154, art. I, Rev. St. 1913, sec. 3137) provides: "Within the intent of this chapter, the business of apportioning and distributing losses arising from specified causes, among all those who apply and are accepted to receive the benefits of such service, is public in character, and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured and their representatives shall rest the burden of maintaining proper practices in said business." By section 78 of the act (Laws 1913, ch. 154, art. IV, Rev. St. 1913, sec. 3215) it is provided: "An insurance corporation may be formed to insure for the following

purposes: * * * Fourth. Fidelity insurance. Guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies, or guaranteeing and executing all bonds, undertakings and contracts of suretyship. Fifth. Liability insurance. Against loss or damage resulting from accident to or injury, fatal or nonfatal, suffered by an employee or other person for which the insured is liable."

By these sections any company or person that engages in the business of apportioning and distributing losses arising from specified causes, among all those who apply and are accepted to receive the benefits of such service, engages in a business of public character. The statute classifies such business as insurance, and provides at large for the regulation and supervision of such business. The argument in the brief is illustrated by the following language there used: "If your honors hold that this contract is one contemplated by the statute, then your honors must expect to be confronted with a demand, supported by the authority of your decision in this case, for an attorney's fee in every case against a surety. * * * And are your honors prepared to say that Jones, in suing Smith on his written promise to see that Brown pays for the groceries he may order from Jones, is entitled to exact his attorney's fee from Smith? If plaintiffs succeed here, Jones must also succeed. There is no difference." It seems plain that the legislature, by the sections above quoted, in connection with other provisions of the act, has attempted to make this very distinction. The distinction plainly is between one who may upon occasion become surety for another, and a company or persons who are engaged in and carry on the business of guaranteeing against losses "among all those who apply and are accepted to receive the benefits of such service." Such business is declared to be "public in character," and the legislature assumes that it is the duty of the state to see that those carrying on such business "shall at all times be actuated by good faith in

everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe and practice the principles of law and equity in all matters pertaining to such business." It classifies this business as insurance, and we cannot say that there is no basis for such classification, and cannot for that reason hold this legislation invalid.

An enactment of 1913 (Laws 1913, ch. 234, Rev. St. 1913, sec. 3212) provides: "That in all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, indemnity, sickness, guarantee, or other insurance of a similar nature, against any company or person doing business in this state, the court upon rendering judgment against such company or person shall allow the plaintiff a reasonable sum as an attorney's fee, in addition to the amount of his recovery, to be taxed as part of the costs."

In the case at bar the "person entitled thereto" brought this action upon a policy (sometimes called a contract in the act, Rev. St. 1913, sec. 3185) of indemnity against the company doing business in this state—a business which is defined in the act as insurance business. In such case the court must allow the plaintiff an attorney's fee, "in addition to the amount of his recovery."

2. Does the statute apply to contracts of this character entered into before the enactment of the statute? It is difficult to harmonize the decisions of this court bearing upon this question. If the allowance of attorney's fees relates to and affects only the remedy and does not affect the contract, it must be considered that the legislature intended that it should apply to all actions upon such contracts, whether the contracts were made before or after the enactment of the statute. It will not be presumed that the legislature intended to increase the legal liability of such companies upon contracts already existing. "It is not within the power of the legislature to create a legal liability out of a past transaction, for which none arose by the law as it stood at the time of its occurrence." 2 Sutherland (Lewis')

Statutory Construction (2d ed.) sec. 671. The statute of 1913 provides: "The court upon rendering judgment against such company or person shall allow the plaintiff a reasonable sum as an attorney's fee, in addition to the amount of his recovery, to be taxed as part of the costs." Laws 1913, ch. 234, sec. 1. If the question that we are considering was now presented for the first time, we would hesitate to say that this statute does not create and add to the contract a legal liability which would not exist under the contract prior to the enactment of this statute. The fact that the attorney's fee is to be taxed as costs in the case is not of itself decisive of the question. It was uniformly held under the act of 1873 that attorney's fees provided for by that act were not a part of the judgment proper, but were to be taxed as costs in the case, and yet, after the repeal of that act, attorney's fees were not allowed in actions upon contracts entered into while the act was in force. The fact that the allowance of attorney's fees and taxing them as costs in the case depended upon there being an express provision in the contract for such allowance would not change the nature of the allowance, and if they were properly considered as costs in the case, and ought to be regarded as a part of the remedy and not as adding any legal liability, the reasoning would apparently be the same, whether or not the contract provided for such costs. If the new statute adds an additional burden to the contracting parties that without the statute would not exist, it has generally been considered that such statute could not be applied to a contract entered into before its enactment. However, in *Security Co. v. Eyer*, 36 Neb. 507, in determining the question here presented, it is said: "Attorney's fees in states where they are allowed by the court to the successful party are in the nature of costs and are taxed and treated as such. They are no part of the judgment proper." In *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 565, in deciding the same point, it is said: "We know of nothing in the Constitution which prohibits the legislature from

enacting that the successful party in litigation may recover a judgment against his adversary for the amount of the costs expended or accrued by him in the prosecution of such suit, nor do we know of anything that prohibits the legislature from including in the term costs a reasonable attorney's fee." These decisions are adhered to in *American Fire Ins. Co. v. Landfare,* 56 Neb. 482, and *Home Fire Ins. Co. v. Weed,* 55 Neb. 146. If these decisions are inconsistent with *White v. Rourke,* 11 Neb. 519, and *Bond v. Dolby,* 17 Neb. 491, and other cases following them, we do not feel at liberty to disregard the later cases, and must therefore hold that attorney's fees under this statute, as being a part of the costs of the litigation, relate to the remedy, and that it was the intention of the legislature that this statute providing for attorney's fees in such cases should apply, in all actions upon such contracts, whether the contract was made before or after the enactment of the statute.

It follows that our former decision should be modified so as to include these attorney's fees in the amount of the recovery, and, as so modified, it is adhered to. The district court will retax the costs allowing reasonable attorney's fees.

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22. It is not negligence *per se* for a street car passenger to have one foot on the steps, one hand holding onto the handrail, and one foot swinging in the air, preparatory to alighting at his destination. *Jelinek v. Omaha & C. B. Street R. Co.* 751

23. In taking a position on the steps, preparatory to alighting, a street car passenger assumes the risks incident to the careful, ordinary and necessary operation of the car. *Jelinek v. Omaha & C. B. Street R. Co.* 751

24. Where a street car passenger is injured by slipping from the steps while the car is in motion and before it reaches its usual stopping place, he must prove that the slipping was caused by negligent operation of the car, and that such negligence was the proximate cause of his injury. *Jelinek v. Omaha & C. B. Street R. Co.* 751

25. Provisions of a bill of lading requiring written notice of damage and fixing a time less than that fixed by statute for commencement of action will be deemed waived unless pleaded as defenses. *Gilinsky v. Illinois C. R. Co.* 858

Commerce.

The fact that congress has declared when a package shall be deemed misbranded does not prevent a state from making other requirements not inconsistent with the act of congress. *In re Arrigo* 134

Conspiracy. See EVIDENCE, 11.

1. Judgment for $23,000 damages *held* not excessive. *Marsh-Burke Co. v. Yost* 523

2. A conspiracy need not be established by direct evidence, but may be inferred from acts of persons pursuing the same object, though by different means. *Marsh-Burke Co. v. Yost.* 523

3. Evidence *held* not to show a conspiracy among defendants to injure plaintiff or his business. *Deupree v. Thornton* 804

Conspiracy—*Concluded.*

4. Where one codefendant makes libelous statements concerning plaintiff without the knowledge or consent of the others, evidence thereof is not competent against the others. *Deupree v. Thornton* 804

Constitutional Law. See EMINENT DOMAIN, 1. JUDGMENT, 6. MUNICIPAL CORPORATIONS, 6, 10. STATUTES, 4, 5, 8.

1. Sec. 3210, Rev. St. 1913, of the "valued policy act," *held* valid. *Dinneen v. American Ins. Co.* 97
2. Ch. 165, Laws 1913, providing for county aid to agricultural societies, which does not contain the limitation as to the amount expressed in the title, violates sec. 11, art. III, Const. *Smith v. Douglas County Agricultural Society*..... 621
3. Sec. 4439, Rev. St. 1913, providing a double shift for firemen, *held* not special legislation in contravention of sec. 15, art. III, Const., though it places the fire chief and his assistant in a different class from other members of the department. *State v. City Council of City of Lincoln*..... 634

Continuance.

Where a litigant is present when his case is set for trial, and he departs to another state without informing his attorney where he may be found, he is not entitled to a continuance as a matter of right. *Dorshimer v. Herndon*..... 421

Contracts.

1. Evidence *held* to show that defendant, in consideration of a certain transfer of merchandise and realty, was to pay a mortgage on plaintiff's homestead. *Logan Valley Bank v. Christensen* 49
2. Ambiguous language in a contract prepared by one of the parties thereto should be given such construction as such party supposed the other would give to it, or such construction as the other party would be fairly justified in giving to it. *Flory v. Supreme Tribe of Ben Hur* 160
3. Decree setting aside conveyances on the ground of insanity *held* justified by the evidence. *Simonsen v. House*..... 653
4. A contract procured by intentional concealment of material facts cannot be enforced by the guilty party. *Linton v. Sheldon* 834

Corporations. See BILLS AND NOTES, 2, 3. FRAUDULENT CONVEYANCES.

1. An agent of a domestic corporation *held* to be "a managing agent," on whom service of summons could be made. *Brophy v. Fairmont Creamery Co.* 307

Corporations—*Concluded.*

2. Summons may be served on a nonresident corporation by service on its managing agent constructing a building in the county. *King Lumber Co. v. Omaha Steel Construction Co.* 542

Counties and County Officers. See ACTION. APPEAL AND ERROR, 44, 46. ELECTIONS. HIGHWAYS, 9.

1. Ch. 46, Laws 1905, and subsequent acts of the legislature, *held* to fix the term of county commissioners of Douglas county at four years. *State v. McDonald* 59

2. A sheriff must report all fees not expressly excepted by statute. *State v. Miller* 179

3. The term of office of county commissioner in counties not under township organization is four years. *State v. McFarland* 198, 854

4. A county *held* not liable for negligence of its employees in its public institutions. *Davie v. Douglas County* 479

Courts. See INDIANS, 3. INTOXICATING LIQUORS, 10. JUDGMENT, 1, 8, 9. SPECIFIC PERFORMANCE, 2, 3. WILLS, 4.

1. A former decision will not be overruled, unless the court is convinced, not only that the decision was wrong, but that less injury will result from overruling than from following it. *Torbitt v. Village of Bennett* 129

2. An action for injuries to realty situated in another state cannot ordinarily be maintained in this state. *Kroll v. Chicago, B. & Q. R. Co.* 322, 324

3. The legislature cannot limit or take from district courts their chancery jurisdiction conferred by sec. 9, art. VI of the Constitution. *Lacey v. Zeigler* 380

4. The county court has no jurisdiction of a suit to quiet title in the administrator, to declare a trust and define the trustee's duties, to determine whether an outstanding life estate exists, and to recover possession for the trustee. *Gotchall v. Gotchall* 730

5. Mandamus allowed to provide for holding court in Arthur county. *State v. Grimes* 762

Creditors' Suit.

1. A valid judgment is requisite as a basis for a creditor's suit to set aside a fraudulent transfer of real estate. *Holmes v. Webster* 105

Creditors' Suit—*Concluded.*

2. Property conveyed by a debtor for future support may be subjected to a judgment, where there is no other means of enforcing payment, to the extent that the value of the property exceeds the amount of support furnished. *Cherry Co. v. Helm* 626

3. A dormant judgment cannot be made the basis for a creditor's bill. *Bank of Miller v. Moore* 843

Criminal Law. See ASSAULT AND BATTERY. FALSE PRETENSES. FOOD. HIGHWAYS, 2-7. INDIANS, 1-3.

1. Where a motion for new trial is overruled, a finding of fact sustained by competent evidence will not be disturbed unless clearly wrong. *Gerwick v. State,* 69

2. A third verdict of guilty will not be set aside as against the weight of evidence, unless the evidence is clearly insufficient. *Flege v. State* 587

3. A third conviction for the same offense will not be set aside for errors, unless it clearly appears that they deprived accused of a fair trial and were the probable cause of his conviction. *Flege v. State* 587

4. Evidence *held* to sustain a conviction of manslaughter. *Flege v. State* 587

5. Refusal of proper instructions fully covered by those given *held* not reversible error. *Flege v. State* 587

6. A conviction will not be reversed for errors in the admission or exclusion of evidence, unless it appears from the record that accused was probably prejudiced thereby. *Carter v. State* 742

7. Instruction defining "reasonable doubt" sustained. *Carter v. State* 742

8. An instruction to acquit unless satisfied beyond a reasonable doubt that defendant was present when the crime was committed, approved. *Carter v. State* 742

9. Where the state concedes after trial that facts exist which could not have been known at the trial, and which, if unexplained, render it improbable that accused is guilty, a new trial will be awarded. *Franco v. State* 746

Damages. See BASTARDY, 3. CARRIERS, 4, 19-21. CONSPIRACY, 1. EMINENT DOMAIN. LANDLORD AND TENANT, 2. MONOPOLIES, 2. PARENT AND CHILD, 2. RAILROADS, 1, 2. TELEGRAPHS AND TELEPHONES. VENDOR AND PURCHASER, 2.

Damages—*Concluded.*

1. Where, in an action for damage to personalty, there is evidence that the damage was caused by defendant's negligence, evidence of the value of the property before and after the injury *held* admissible to prove the measure of damages. *Reed v. Chicago, B. & Q. R. Co.* 19
2. The trial court may order an expert examination of the person of the party injured, where circumstances make it necessary and no substantial harm can result. *State v. Troup*.. 333
3. An examination of the person will not be ordered unless it clearly appears that a condition exists that can be definitely determined only by such examination. *State v. Troup* 333
4. The amounts provided for in the employers' liability act (Laws 1913, ch. 198) as compensation for damages cannot be taken as a standard of comparison in an action for injuries suffered before its enactment. *Russo v. Omaha & C. B. Street R. Co.* 436
5. In an action for breach of contract, the vendor may recover of the vendee damages fairly within the contemplation of the parties at the time they made their contract. *Roper v. Milbourn* 466
6. On revivor of an action for personal injuries, *held* that the administrator is entitled to recover all damages that plaintiff could have recovered if he had survived, including injuries to or loss of his earning power. *Murray v. Omaha Transfer Co.* 482
7. Instruction not to allow damages where there was no evidence to sustain them *held* proper. *Sinclair v. Dunning*.... 115
8. Judgment for $7,500 for injury to an arm and shoulder *held* excessive. *Shimick v. Cudahy Packing Co.* 412
9. A verdict of $15,000 for death *held* excessive. *Sorensen v. Selden-Breck Construction Co.* 689

Deeds. See EVIDENCE, 1. HOMESTEAD, 2.

1. A covenant of general warranty made by the holder of a final receiver's receipt is broken where the government cancels the receipt, at which time a right of action accrues. *Albright v. Schwabland* 190
2. Title to land *held* to revert to grantor for failure of grantee to rebuild an elevator in accordance with a condition in the deed. *Nye-Schneider-Fowler Grain Co. v. Hopkins*..... 512

Divorce.

In passing on the compensation of attorneys in a divorce suit, the supreme court will exercise its own discretion in con-

Divorce—*Concluded.*

nection with estimates placed by experts upon the value of the services. *Bolton v. Bolton* 625

Dower. See WILLS, 2, 3.

Drains. See EMINENT DOMAIN, 4-6.

1. Record of the meeting of the board of directors of a drainage district *held* to show that the board made an apportionment of benefits and published the same. *Baker v. Morrill Drainage District* 791
2. By appealing from the apportionment of benefits made by directors of a drainage district, landowners waive any right to insist that no apportionment of benefits has been made. *Baker v. Morrill Drainage District* 791
3. Evidence *held* to sustain the court's findings sustaining the action of the directors of a drainage district in apportioning benefits. *Baker v. Morrill Drainage District*..... 791
4. In a suit to enjoin the directors of a drainage district from issuing or selling securities, *held*, that plaintiff's rights were barred by laches; rights of third persons having intervened. *Baker v. Logan*..... 795

Easements.

1. An easement in a city street could be acquired by adverse possession for ten years, prior to the enactment of ch. 79, Laws 1899. *Torbitt v. Village of Bennett* 129
2. A purchaser of land burdened with an open and visible easement is ordinarily chargeable with notice thereof. *Moll v. Hagerbaumer* 555
3. Temporary deviations from a well-defined track do not necessarily affect an easement by adverse user. *Moll v. Hagerbaumer* 555
4. The construction of a gate at the entrance to a private way *held* not inconsistent with an easement. *Moll v. Hagerbaumer* 555
5. Where a landowner has openly, notoriously and continuously used a private way for more than ten years, he will be presumed to have done so under a claim of right. *Moll v. Hagerbaumer* 555

Elections. See MANDAMUS, 3. MUNICIPAL CORPORATIONS, 5, 6.

1. Failure to give the statutory notice of election of county commissioner will invalidate such election, where it appears

Elections—*Concluded.*

that such failure prevented the electors generally from voting for commissioner. *State v. McFarland* 854

2. Sec. 17, ch. 149, Laws 1913, *held* a legislative construction of former conflicting statutes, and to establish that subsequent to ch. 46, Laws 1905, and the amendment of sec. 13, art. XVI of the Constitution, no valid election of commissioners could be held in the odd-numbered years in counties having three commissioners. *De Larm v. Van Camp*.... 857

Eminent Domain.

1. Sec. 3438, Rev. St. 1913, requiring maintenance of bridges across irrigation ditches, *held* not void as authorizing the taking of property of the irrigation company without compensation. *State v. Farmers Irrigation District* 239

2. Instructions as to interest on award of damages sustained. *Grimm v. Elkhorn Valley Drainage District* 260

3. Instructions as to award of damages sustained. *Grimm v. Elkhorn Valley Drainage District* 260

4. An award of damages in proceedings to condemn land for a drainage ditch will not be disturbed unless clearly wrong. *Grimm v. Elkhorn Valley Drainage District* 260

5. Condemnation of lands for drainage purposes *held* to be for a public use. *Grimm v. Elkhorn Valley Drainage District*.... 260

6. Evidence *held* to sustain verdict awarding damages for land condemned for a drainage ditch. *Grimm v. Elkhorn Valley Drainage District* 260

7. Refusal of an instruction that a condemnee should use all reasonable effort to make the injury as small as possible *held* not error. *Grimm v. Elkhorn Valley Drainage District* 260

8. An instruction to the jury directing them to view the premises without discussion *held* to comply with sec. 7847, Rev. St. 1913. *Drollinger v. Hastings & N. W. R. Co.* 520

9. In condemnation proceedings, it is proper to permit the jury to view the premises, and to take into account their observations in reaching their verdict. *Drollinger v. Hastings & N. W. R. Co.* 520

10. Where an appeal from an award in condemnation proceedings is tried on the transcript from the county court, matters which the appraisers could not have properly considered are not admissible in evidence. *Clarke v. Nemaha Valley Drainage District* 549

Eminent Domain—*Concluded.*

11. The state can authorize such corporations as it sees fit to exercise the right of eminent domain in the public interest. *Rogers v. Cosgrave* 608

12. The fact that a corporation derives its charter from another state *held* not to prevent it from complying with the Nebraska statutes so as to become a domestic corporation with right of eminent domain. *Rogers v. Cosgrave* 608

13. Evidence *held* to show that the parties could not agree, and to authorize the ascertainment of damages by condemnation. *Rogers v. Cosgrave* 608

14. Where one of two owners in common of land fails to agree to sell same, it is unnecessary to negotiate with the other as a prerequisite to the ascertainment of damages by condemnation. *Rogers v. Cosgrove* 608

15. Where a portion of a farm has been overflowed by the construction of a dam under a right from the state, special benefits, such as ice privileges, may be set off against incidental damages to the residue of the tract. *Trabert v. Boyes* 671

Estoppel. See INSURANCE, 12.

An owner who conveyed realty, and transferred machinery thereon by a separate bill of sale, taking back a mortgage describing the realty, *held* estopped to claim the machinery as part of the mortgaged realty, as against a purchaser from the mortgagor. *Bell v. Looker* 327

Evidence. See BANKS AND BANKING, 5. BASTARDY, 2. BILLS AND NOTES, 3-5, 7, 13. CARRIERS, 1, 4, 7, 18, 19, 22, 24. CONSPIRACY. CRIMINAL LAW. DAMAGES, 2, 3. EMINENT DOMAIN, 10. FALSE PRETENSES, 2. INTOXICATING LIQUORS, 2, 11. MASTER AND SERVANT, 1-3, 14. NEGLIGENCE, 3. PARTNERSHIP, 7, 8. SALES, 8. TELEGRAPHS AND TELEPHONES, 2. WITNESSES.

1. Parol evidence is admissible to show the true consideration for a deed, though the deed recites a consideration. *Logan Valley Bank v. Christensen* 49

2. Where it is claimed that an oral contract reduced to writing was signed by defendant without knowledge of its contents, evidence of the prior oral contract is admissible to show the consideration for the writing and the probability that defendant knew its contents. *Pierce v. Domon*..... 120

3. Where an insurance receipt fails to state on which of two applications the payment is made, parol evidence is admis-

Evidence—*Concluded.*

sible to determine the question. *Rankin v. Northern Assurance Co.* 172

4. Parol evidence is admissible to show that a written contract among partners was a mere sham. *Coffman v. Malone.*. 819

5. When plaintiff has complied with sec. 7960, Rev. St. 1913, and defendant refuses to produce the instrument called for, the court should direct the jury to presume it to be such as plaintiff's affidavit alleges it to be, and this rule applies to indorsements thereon. *Rankin v. Northern Assurance Co.* 172

6. The recital in a contract of the date of its execution is *prima facie* evidence that it was executed at that time. *Bullock v. Power-Heafey Coal Co.* 221

7. An objection to a question calling for the opinion of an expert on the ultimate fact to be determined should be sustained. *Neal v. Missouri P. R. Co.* 460

8. The owner of property destroyed by fire may testify to its value. *Neal v. Missouri P. R. Co.* 460

9. The owner's testimony as to the value of personalty *held* admissible. *Gibbons v. Chicago, B. & Q. R. Co.* 696

10. Testimony of a member of a partnership as to the market value of cattle *held* not conclusive against the partnership. *Meyers & Cox v. Western Union Telegraph Co.* 471

11. Where an unlawful conspiracy is established, everything said, written or done by any of the conspirators in furtherance of the common purpose may be proved against each and all of them. *Marsh-Burke Co. v. Yost* 523

12. Courts will take judicial notice of the different class of service rendered by the fire chief and his assistant from that rendered by other officers of the department. *State v. City Council of City of Lincoln* 634

13. Plaintiff's uncontradicted testimony as to facts equally within the knowledge of defendant's agents *held* to establish such facts. *Gibbons v. Chicago, B. & Q. R. Co.* 696

14. Defendant has the burden of proving an affirmative defense. *Omaha Nat. Bank v. Graham* 844

Execution.

1. Where a judgment creditor had an execution levied on land on which he had foreclosed, *held* that he was entitled to have the surplus, after payment of the execution, applied on the foreclosure decree. *Storz Brewing Co. v. Hansen* 282

Execution—*Concluded.*

2. Secs. 8117, 8118, Rev. St. 1913, apply to proceedings in garnishment after judgment and return of an execution *nulla bona*, while secs. 8100, 8101 do not apply. *Mercer v. Armstrong* 645

Executors and Administrators. See DAMAGES, 6. WILLS.

1. Evidence *held* to sustain defense of payment of claims. *Loeb v. Estate of Huston* 314

2. Evidence *held* to sustain the findings as to the amount of money advanced by defendant to his father and as to the rental value of land occupied by defendant. *Tillson v. Holloway* 509

3. Where a son advanced money to his father and occupied his father's land, agreeing that they would sometime adjust the matter, allowing for interest and use of the land, *held*, that a decree adjusting the accounts should not allow compound interest on the rentals. *Tillson v. Holloway* 509

4. Though notice of final settlement has been given, orders adjusting items of the account are not final, if the administrator is not discharged, and a further report is necessary. *In re Estate of Wilson* 852

False Pretenses.

1. An indictment for obtaining money by false pretenses is not fatally defective because ownership of the money is not alleged in direct terms, where that fact is shown by the indictment as a whole. *McClintock v. State* 158

2. Under an indictment charging that accused obtained money by falsely pretending that he owned specific property, the state must prove that he did not then own the property. *McClintock v. State* 158

Food. See COMMERCE. STATUTES, 14.

The provision of the "Pure Food Law" that certain food products sold in package form shall be deemed "misbranded" if the package contains any gifts, premiums, or prizes, *held* a valid exercise of the police power. *In re Arrigo*..... 134

Fraud.

Evidence *held* not to show fraud in an exchange of properties. *Sinclair v. Dunning* 115

Fraudulent Conveyances. See GARNISHMENT, 3.

1. Under sec. 2643, Rev. St. 1913, transfers made to evade the Gibson act (Laws 1907, ch. 82), restricting the leasing of buildings for saloon purposes, are void. *Enos v. Hanff*.... 245

Fraudulent Conveyances—*Concluded.*

2. A transfer of property of a corporation, controlled by the husband, to a new corporation, controlled by the wife, *held* a transfer from husband to wife, within sec. 2643, Rev. St. 1913. *Enos v. Hanff* 245

3. A transfer of property from one corporation to another to enable the first corporation to continue leasing buildings for saloons is illegal, and, if the purpose is known by the stockholders of the new corporation, such corporation may be dissolved by *quo warranto*. *Enos v. Hanff* 245

Garnishment. See EXECUTION, 2.

1. Funds of a debtor in the hands of another subject to demand are not exempt from garnishment for want of such demand by the debtor. *Legan v. Smith* 7

2. A general denial is a sufficient answer in a suit brought under sec. 8385, Rev. St. 1913, for an alleged unsatisfactory answer in garnishment. *Maroosis v. Catalano* 284

3. A purchaser of goods in violation of the Bulk Sales Law holds as trustee for the seller's creditors, and his liability may be enforced by garnishment, though he has paid for and has resold the goods. *Interstate Rubber Co. v. Kaufman* 562

Highways.

1. A road used by the public for more than 10 years *held* a public road, though not laid out in compliance with statutory requirements. *Maticka v. Jensen* 39

2. A public highway may be established by dedication and use, or by adverse user for ten years. *Barden v. State*..... 180

3. In a prosecution for obstructing a highway, the state must prove that the obstruction was within the highway. *Barden v. State* 180

4. Where the county commissioners establish a public highway, one wilfully obstructing same may be prosecuted for nuisance. *Barden v. State* 180

5. The location of public roads indefinitely located will not be determined by criminal proceedings. *Barden v. State*..... 180

6. In a prosecution for obstructing a highway, the location and boundaries of the highway must be proved beyond a reasonable doubt. *Barden v. State* 180

7. In a prosecution for obstructing a highway, evidence *held* not to show its boundaries with sufficient definiteness to sustain a conviction. *Barden v. State* 180

Highways—*Concluded.*

8. Where a landowner fences a traveled way which the public uses for nearly ten years, dedication may be inferred. *Robison v. Gebauer* 196

9. Counties are jointly and severally liable for failure to keep in a reasonably safe condition a county line road established in part by each county. *Ewh v. Otoe County*..... 469

10. A stream of running water flowing between well-defined banks across a public road, and of sufficient width and depth to require a bridge, is a "stream," within sec. 3060, Rev. St. 1913. *State v. Eickhoff* 739

Homestead.

1. Evidence *held* to sustain the burden cast on the defendants to show abandonment of the homestead. *Whitford v. Kinzel* 601

2. Evidence *held* to show that a conveyance of the homestead was void because of the wife's incompetency. *Hohenshell v. Hohenshell* 649

Husband and Wife. See FRAUDULENT CONVEYANCES, 2.

1. A wife may sue for separate maintenance. *Keup v. Keup*.. 321

2. A warranty deed made prior to 1877, by a husband direct to his wife, conveyed to her all his estate in the premises. *Currier v. Teske* 660

Indians.

1. Under 24 U. S. St. at Large, ch. 119, *held* that certain allottee Indians residing in Nebraska are citizens thereof. *Kitto v. State* 164

2. Offenses committed by Indians, and not expressly reserved by 23 U. S. St. at Large, ch. 341, *held* within the jurisdiction of the state courts, as provided by 12 U. S. St. at Large, ch. 119, and 24 U. S. St. at Large, ch. 119. *Kitto v. State*.. 164

3. The crime of assault by an allottee Indian on another Indian in Nebraska within an Indian reservation, not being one reserved by act of congress to the jurisdiction of federal courts, is within the jurisdiction of the state courts. *Kitto v. State* 164

4. 36 U. S. St. at Large, p. 856, sec. 2, authorizing an Omaha Indian allottee under 22 U. S. St. at Large, p. 342, sec. 6, to devise his interest in the land, is not inconsistent with the prior act. *Moore v. Busse* 813

Indians—*Concluded.*

5. The provision of 36 U. S. St. at Large, p. 856, sec. 2, requiring approval of the will of an Omaha Indian allottee, does not require that such approval be contemporaneous with the making of the will, or before testator's death. *Moore v. Busse* 813

6. Where a will devising land allotted to an Omaha Indian and probate thereof are regular, the interest of the testator passes to the devisee on approval of the will by the proper officials. *Moore v. Busse* 813

Indictment and Information. See FALSE PRETENSES.

Injunction. See TAXATION, 2.

Injunction will not lie to prevent the enforcement of an alleged void statute, where it is not affirmatively shown that plaintiff has not an adequate remedy at law, in a prosecution thereunder. *Western Reference & Bond Ass'n v. Morehead* 717

Insurance. See CONSTITUTIONAL LAW, 1.

1. After a partial loss rendering the building untenantable, the insured is not guilty of a breach of the vacancy clause of the policy because he permits the property to remain unoccupied with the knowledge of the insurer. *Schmidt v. Williamsburgh City Fire Ins. Co.* 61

2. It is not within the contemplation of the parties that an insured building shall be occupied by a tenant when, as a result of fire, it becomes unfit for occupancy. *Schmidt v. Williamsburgh City Fire Ins. Co.* 61

3. Where insured property is totally destroyed as the result of three fires, the measure of recovery for the final loss is the face of the policy. *Schmidt v. Williamsburgh City Fire Ins. Co.* 61

4. Evidence, in an action on a fire insurance policy, *held* to show that notice of loss was given shortly after the fire. *Schmidt v. Williamsburgh City Fire Ins. Co.* 61

5. Under sec. 3210, Rev. St. 1913, *held*, that a condition in a policy providing for payment of less than the face of the policy where the insured building is so injured as to require its demolition or removal is void. *Dinneen v. American Ins. Co.* 97

6. When writing insurance on a building within city fire limits, the insurer is bound by the laws and ordinances of the city. *Dinneen v. American Ins. Co.* 97

Insurance—*Continued.*

7. Under sec. 3210, Rev. St. 1913, where an insured building is so injured by fire as to require that it be demolished or removed, the insured can recover as for a total loss. *Dinneen v. American Ins. Co.* 97
8. Contracts of a local agent are binding on the insurance company, if within his apparent authority and entered into in good faith by the insured. *Rankin v. Northern Assurance Co.* 172
9. Payment of premium to a local agent *held* binding on the company. *Rankin v. Northern Assurance Co.* 172
10. A contract of insurance may be in writing or may be verbal, or partly in writing and partly verbal. *Rankin v. Northern Assurance Co.* 172
11. Where an agent knowingly inserted in an application a false age of the insured, stating that it was immaterial, *held* that it did not invalidate the policy. *Wisenstine v. Interstate Business Men's Accident Ass'n* 365
12. Company *held* estopped to declare a policy void for a false statement written in the application by its agent. *Wisenstine v. Interstate Business Men's Accident Ass'n* 365
13. Where an agent, by a false statement that the policy was void, procured a settlement of a $5,000 policy for $425, *held* that, upon a return of the $425, the settlement should be set aside. *Wisenstine v. Interstate Business Men's Accident Ass'n* 365
14. The amount of extended insurance, where insured dies during default after making a loan on his policy, should be computed according to the contract. *Rustin v. Ætna Life Ins. Co.* 426
15. Money loaned insured under a policy loan contract *held* to constitute "an indebtedness to the company against the policy," as such phrase was used in the contract. *Rustin v. Ætna Life Ins. Co.* 426
16. Where a loan made to insured had not been paid at the time of default, *held* that the beneficiary was entitled only to temporary insurance, as provided in the policy. *Rustin v. Ætna Life Ins. Co.* 426
17. Whether notice of assessment was properly mailed to insured *held* a question for the jury. *O'Donnell v. Ridgley Protective Ass'n* 497
18. Payment of an assessment to a local agent *held* a payment to the company. *O'Donnell v. Ridgley Protective Ass'n* 497

Insurance—*Concluded.*

19. An instruction making the receipt of notice of assessment, instead of mailing thereof, the test of due service, if erroneous, *held* without prejudice, where the jury found that no notice was mailed. *O'Donnell v. Ridgley Protective Ass'n*.. 497

20. Evidence in an action on a fire policy *held* to sustain verdict for plaintiff. *Larson v. Central Nat. Fire Ins. Co.* 845

21. Evidence *held* to show that proofs of loss were furnished. *Larson v. Central Nat. Fire Ins. Co.* 845

22. Ch. 234, Laws 1913, providing for attorney's fees in an action on a school district contractor's bond, *held* not applicable to contracts entered into before that act took effect. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.* 27

23. Where fraud of mortgagor in procuring insurance is established, and the insurer has paid the amount of the mortgage to the mortgagee, it may be subrogated to the mortgagee's rights, but not otherwise. *Ætna Life Ins. Co. v. National Union Fire Ins. Co.* 446

24. Where insured recovers on a policy, he is entitled to an attorney's fee. *Ætna Life Ins. Co. v. National Union Fire Ins. Co.* 446

25. Mortgagee *held* not entitled to an attorney's fee. *Ætna Life Ins. Co. v. National Union Fire Ins. Co.* 446

26. A surety company *held* to be within sec. 3137, Rev. St. 1913, relating to insurance companies, and liable, under sec. 3212, for attorney's fees in actions on its contracts. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.* 863

27. Ch. 234, Rev. St. 1913, providing for attorney's fees to be taxed as costs in judgment against insurance companies, *held* to relate to the remedy, and to apply to contracts entered into before as well as after the enactment of the statute. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.* 863

Interest. See EXECUTORS AND ADMINISTRATORS, 3.

Intoxicating Liquors. See FRAUDULENT CONVEYANCES. STATUTES, 6, 7.

1. The location of a saloon licensed by a city council rests in its discretion. *Enos v. Hanff* 245

2. The burden is on remonstrants to prove their allegations that the surety company executing the bond tendered was not licensed to do business in the state, and had no power to become such surety. *Enos v. Hanff* 245

Intoxicating Liquors—*Concluded.*

3. Evidence *held* to show that applicant for liquor license was a man of respectable character and standing. *Enos v. Hanff* 245
4. An order of the licensing board granting a license is not an ordinance, within secs. 5227, 5237, Rev. St. 1913. *Enos v. Hanff* 245
5. An ordinance regulating licensing of sale of liquors must be enacted before a license can be granted. *Enos v. Hanff*.. 245
6. The licensing board cannot refuse a license because of doubts in regard to the good faith of the title of the apparent owner of the property where the saloon is to be conducted. *Enos v. Hanff* 245
7. Where a liquor license was issued and the license fee paid, and on appeal the license was revoked, *held* that the applicant could recover a proportionate part of the fee for the periods before its issuance and after its revocation. *Shue v. School District* 455
8. The provisions of secs. 6491-6493, Rev. St. 1913, apply in an action to recover *pro tanto* money paid as an occupation tax for selling liquor at retail. *Shue v. Village of Silver Creek* 551
9. The issuance of liquor licenses rests in the discretion of the excise boards. *Minneapolis Brewing Co. v. Flynn* 735
10. The courts' power to review decisions of excise boards extends to determining whether the jurisdictional facts exist, and whether in refusing licenses they have abused their discretion. *Minneapolis Brewing Co. v. Flynn* 735
11. It will be presumed that an excise board has exercised a legal discretion in determining the number of liquor licenses to be issued, and in refusing to grant a license in excess of that number. *Minneapolis Brewing Co. v. Flynn* 735

Judges.

An objection that a county judge who held the preliminary examination was disqualified by failure to give bond, *held* properly overruled, where made for the first time by plea in abatement in the district court. *Barden v. State* 180

Judgment. See COURTS, 1.

1. Where the courts of the state of testator's domicile have disregarded an antenuptial agreement and assigned dower to the widow, the courts of Nebraska will disregard such agreement. *Mettler v. Warner* 111

Judgment—*Concluded.*

2. The reduction of a judgment rendered on a forfeited recognizance will not be disturbed where an abuse of discretion is not clearly shown. *State v. Mullally* 162

3. A petition to vacate a judgment for fraud *held* sufficient, where a meritorious defense to a substantial part of the judgment was alleged. *Wunrath v. Peoples Furniture & Carpet Co.* 342

4. A vacation of a judgment for perjury or fraud will not be disturbed, in the absence of a clear abuse of discretion. *Wunrath v. Peoples Furniture & Carpet Co.* 342

5. Evidence *held* to show no abuse of discretion in the vacation of a judgment for fraud. *Wunrath v. Peoples Furniture & Carpet Co.* 342

6. The time between the passage of ch. 154, Laws 1909, and the date when it took effect will be considered in determining whether reasonable time was given thereby to judgment creditors in which to assert their rights. *Atkinson v. Uttley*.... 722

7. Ch. 154, Laws 1909, relating to revivor of dormant judgments, applies to judgments rendered before as well as after its passage. *Atkinson v. Uttley* 722

8. The forum for the revival of a dormant judgment is the court of original jurisdiction, and revival in a court to which the judgment has been transcribed is void. *Bank of Miller v. Moore* 843

9. A judgment of the federal court can be revived only in the court where rendered. *Holmes v. Webster* 105

Jury. See EMINENT DOMAIN, 8, 9.

1. It is improper for jurors, after submission of the case, to leave the officer in charge thereof, and go to a saloon and drink liquors. *Reed v. Chicago, B. & Q. R. Co.* 19

2. Misconduct of jurors in going to a saloon and drinking, after submission of the case, *held* not to require a reversal. *Reed v. Chicago, B. & Q. R. Co.* 19

3. Refusal of request for a jury trial on the issue of fraud in procuring insurance *held* error. *Ætna Life Ins. Co. v. National Union Fire Ins. Co.* 446

Justice of the Peace.

1. The filing of an affidavit for a change of venue for bias of the justice will not deprive him of jurisdiction, where there is no other justice in the county to whom the case can be transferred. *Huff v. Arnett* 420

Justice of the Peace—*Concluded.*

2. The 10 days for filing an appeal bond does not begin to run until judgment is entered on the justice's docket. *Bishop v. Lincoln Baseball Club* 558

Landlord and Tenant. See FRAUDULENT CONVEYANCES. STATUTES, 6.

1. A tenant *held* liable for loss of the leased premises by fire caused by his negligence. *Brophy v. Fairmont Creamery Co.* 307
2. Where a lessee's rights are molested by the lessor, he may recover such damages as are the natural and direct consequence of the breach. *Schneider v. Reeves* 629
3. The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud, the lessee cannot recover for personal injuries received through latent defects in the premises, of which the lessor had no knowledge and which were as patent to the lessee as to the lessor. *Davis v. Manning* 707

Libel. See CONSPIRACY, 3, 4. LIMITATION OF ACTIONS, 5.

A truth published with good motives and for justifiable ends is not libelous. *Deupree v. Thornton* 804

Limitation of Actions. See ADVERSE POSSESSION. DEEDS, 1. DRAINS, 4.

1. No action can be maintained on a dormant domestic judgment, unless commenced within five years after its rendition. *Holmes v. Webster* 105
2. An action to enforce the lien of a specific money bequest upon realty in the hands of the residuary legatee is not barred until ten years from the time payment becomes due. *Klug v. Seegabarth* 272
3. Limitations do not run in favor of a foreign corporation while service of summons cannot be had upon it in the state. *Ball Engine Co. v. Bennett Co.* 290
4. A person seeking to avail himself of the statute of limitations of a foreign state must plead and prove the statute. *Ball Engine Co. v. Bennett Co.* 290
5. An action for damages for libel is barred in one year. *Deupree v. Thornton* 804

Mandamus. See COURTS, 5.

1. Under sec. 8271, Rev. St. 1913, mandamus will not lie to control the judicial discretion of an inferior tribunal. *State v. Hoctor* 15

Mandamus—*Concluded.*

2. A public officer may be compelled by mandamus to perform a specific duty as to which he has not discretion. *State v. Rice* 36

3. Where no valid election could be held for county commissioner in 1914, *held* error to award manadamus compelling a count of votes for that office and issuance of a certificate of election. *State v. McFarland* 198

4. Although the writ of prohibition has been abolished, violation of law by inferior tribunals will be prevented by mandamus, where there is no other adequate remedy. *State v. Troup*.. 333

5. A citizen may sue to compel city officers to execute the laws relating to fire protection. *State v. City Council of City of Lincoln* 634

Master and Servant. See NEGLIGENCE, 6, 7.

1. In an action for death of a servant, plaintiff must prove at least one or more of the negligent acts alleged. *Miller v. Chicago, B. & Q. R. Co.* 361

2. Evidence, in an action for death, *held* insufficient to sustain judgment for plaintiff. *Miller v. Chicago, B. & Q. R. Co.* 361

3. An employer's oral promise to pay an employee his salary during disability may be shown by parol to be part consideration for a written release. *Swanson v. Union P. R. Co.* 373

4. Questions as to the nature and extent of plaintiff's injury, resulting disability, and the amount of recovery are ordinarily questions for the jury. *Shimick v. Cudahy Packing Co.* 412

5. Where the negligence of defendant's foreman concurred with the negligence of a fellow servant, *held* that the defendant was liable. *Russo v. Omaha & C. B. Street R. Co.* 436

6. Whether a direction to an employee to pour caustic soda into a washing machine while in motion constituted negligence *held* a question for the jury. *Shannon v. Swift & Co.* 442

7. Whether it was contributory negligence for an employee to obey a direction to pour caustic soda into a washing machine while in motion *held* a question for the jury. *Shannon v. Swift & Co.* 442

8. Under the evidence, *held* not error to submit to the jury whether the employer was negligent in failing to warn the employee of the dangers incident to the use of caustic soda. *Shannon v. Swift & Co.* 442

Master and Servant—*Continued.*

9. An instruction that an employer must furnish a "safe place to work," *held* not to require a reversal, where followed by a full explanation of the expression, and it does not appear that the jury was misled. *Brown v. Omaha & C. B. Street R. Co.* 613
10. An employee is not chargeable with notice of defects in appliances, unless their observation is within the line of his duties, or the defects are obvious. *Brown v. Omaha & C. B. Street R. Co.* 613
11. An employer must exercise reasonable care to furnish a safe place to work and safe appliances under the conditions and circumstances of the employment. *Brown v. Omaha & C. B. Street R. Co.* 613
12. An employer *held* liable for defects in appliances which were known, or should have been known, to him. *Brown v. Omaha & C. B. Street R. Co.* 613
13. An employee guilty of contributory negligence cannot recover for injuries. *Brown v. Omaha & C. B. Street R. Co.* .. 613
14. The burden is on the employer to establish contributory negligence. *Brown v. Omaha & C. B. Street R. Co.* 613
15. "Independent contractor" defined. *Bodwell v. Webster*.... 664
16. While the existence of the right to control the work is the usual test to determine whether the workman is a servant or an independent contractor, the right of the employer to discharge and the mode of compensation may be factors in determining the question. *Bodwell v. Webster* 664
17. The mere nominal employment of a person as an independent contractor will not relieve the master of liability for his torts, where he is in fact employed as a servant. *Bodwell v. Webster* 664
18. In an action by a workman for injuries, *held* that whether he was an independent contractor was a question for the jury. *Bodwell v. Webster* 664
19. Master *held* liable for injury to employee from neglecting the safeguards required by law in keeping and using inflammable oils. *Sorensen v. Selden-Breck Construction Co.* 689
20. A servant assumes the ordinary risks incident to his employment, which he knows, or which a person of his age, experience and capacity should know. *Walters v. Chicago G. W. R. Co.* 783
21. An employer's direction to an employee to hurry is not actionable negligence, where it does not subject him to

Master and Servant—*Concluded.*

unusual hazard or prevent him from exercising ordinary care. *Walters v. Chicago G. W. R. Co.* 783

22. Where plaintiff's injury was caused by obvious and known risks, and he relied on defendant's promise to remedy dangerous conditions, he should plead and prove such facts. *Hampton v. Lincoln Traction Co.* 839

Monopolies. See CONSPIRACY, 2.

1. A combination to prevent competition in business is violative of ch. 45, Rev. St. 1913. *Marsh-Burke Co. v. Yost*..... 523

2. An overt act in furtherance of a combination to stifle competition is actionable, and the members of the combination are liable to one injured thereby for all damages proximately resulting therefrom. *Marsh-Burke Co. v. Yost*..... 523

Mortgages.

1. To justify setting aside a foreclosure sale because the appraisal was too low, the actual value must so greatly exceed the appraised value as to raise a presumption of fraud. *Fink v. Murdock* 1

2. Notice of a judicial sale published in every issue of a weekly newspaper for 30 days before the day of sale is sufficient. *Fink v. Murdock* 1

3. A defect in the paper title *held* no defense in foreclosure of a purchase money mortgage, where mortgagor had title by adverse possession. *Franklin v. Heskett* 296

4. The rights of mortgagor's son and sole heir *held* not affected by foreclosure proceedings to which he was not a party. *Currier v. Teske* 660

Municipal Corporations. See CONSTITUTIONAL LAW, 3. MANDAMUS, 5.

1. A traveler who knows of a dangerous excavation in a sidewalk is not negligent, as a matter of law, because he attempts in the dark to pass around such excavation. *Welsh v. City of South Omaha* 148

2. A city should exercise ordinary care to guard excavations near sidewalks or paths to which traffic is diverted by the making of improvements. *Welsh v. City of South Omaha*.. 148

3. A city *held* liable for injury from an unguarded excavation at the intersection of a street with a private road used by the public. *Cook v. City of Nebraska City* 205

Municipal Corporations—*Concluded.*

4. Vacation of a recorded plat of an addition to a village divests public rights in the streets, and the title reverts to adjoining proprietors. *Johnson v. Buhman* 236

5. The adoption or rejection of a licensing ordinance is within the initiative and referendum act. *Enos v. Hanff* 245

6. The initiative and referendum act of 1897 (Laws 1897, ch. 32) *held* not invalid as an attempt to regulate the administration of city affairs. *Enos v. Hanff* 245

7. The mayor of a city of the second class having less than 5,000 inhabitants may cast the deciding vote when the council is equally divided. *Enos v. Hanff* 245

8. Evidence *held* to show that a city marshal and member of the board of health was entitled to recover for use of a horse and buggy during a smallpox epidemic. *Malcolm v. City of Lexington* 500

9. Sec. 4439, Rev. St. 1913, providing for a double shift for firemen, *held* mandatory. *State v. City Council of City of Lincoln* 634

10. Ch. 7, Laws 1913 (Rev. St. 1913, sec. 4439), amending sec. 8057, Ann. St. 1911, *held* a valid enactment, binding on all cities having more than 40,000 and less than 100,000 inhabitants. *State v. City Council of City of Lincoln* 634

Negligence. See CARRIERS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1-3. RAILROADS, 5, 6. TRIAL, 16.

1. Contributory negligence is an affirmative defense which cannot be proved unless pleaded. *Reed v. Chicago, B. & Q. R. Co.* 19

2. Two occupants of an automobile *held* jointly liable for negligence resulting in injury to occupants of a buggy. *Judge v. Wallen* 154

3. Where a person is killed through negligence of another, it will be presumed, in absence of evidence to the contrary, that deceased was exercising reasonable care. *Sorensen v. Selden-Breck Construction Co.* 689

4. In an action for death, an instruction that it will be presumed that deceased was exercising due care *held* erroneous, where the evidence was conflicting. *Sorensen v. Selden-Breck Construction Co.* 689

5. Instructions as to presumption of due care *held* not prejudicial requiring a reversal. *Sorensen v. Selden-Breck Construction Co.* 689

Negligence—*Concluded.*

6. A transportation company which furnished defective appliances, by reason whereof a servant of a manufacturer was injured, *held* liable for the injuries. *Wiseblood v. Omaha Merchants Express & Transfer Co.* 757

7. An injured employee's settlement with his employer and a release expressly reserving his right of action against a company causing the injury, *held* not to defeat his action against the company. *Wiseblood v. Omaha Merchants Express & Transfer Co.* 757

New Trial. See APPEAL AND ERROR, 39, 40. CRIMINAL LAW, 9.

1. Where a case was taken under advisement, a motion for new trial filed within three days from rendition of judgment *held* to be in time. *Dinneen v. American Ins. Co.* 97

2. Where the term is adjourned before the court rules on a motion for new trial, the mover is entitled to a ruling thereon at a subsequent term. *Maroosis v. Catalano* 284

3. Motion for new trial *held* filed out of time. *Havens-White Coal Co. v. Bank of Rulo* 632

Notice. See MORTGAGES, 2. STATUTES, 12, 13. WILLS, 19, 20.

Parent and Child.

1. Where the father notified a person harboring a minor that he would claim his wages, *held* that the notice was a waiver of the father's right to sue in tort for enticing the son away. *Wolf v. Vannoy* 637

2. The measure of damages for harboring a minor *held* to be the reasonable value of his services, not exceeding the amount specified in a notice to defendant by the father. *Wolf v. Vannoy* 637

Partition.

Involuntary partition of an estate devised cannot be decreed contrary to a provision in the will. *Peterson v. Damoude*.. 370

Partnership.

1. In the absence of fraud or conduct constituting an estoppel, a partner cannot, without the consent of his copartners, apply firm property to the payment of his individual indebtedness. *Bullock v. Power-Heafy Coal Co.* 221

2. Neglect of farm property by the partner in charge thereof *held* ground for dissolution of the partnership. *Lisco v. Husmann* 276

Partnership—*Concluded.*

3. A finding that a partnership exists will be upheld if supported by evidence, though one partner denied its existence. *Warrington v. Stewart* 293

4. Where one partner has not been given credit for money paid by him for a deceased partner, such credit will be given on appeal. *Warrington v. Stewart* 293

5. On dissolution of a partnership by death of partner, control of the assets vests in the surviving partner. *Loeb v. Estate of Huston* 314

6. A surviving partner has power to assign a judgment belonging to the partnership. *Loeb v. Estate of Huston* 314

7. In a suit for dissolution of a partnership and accounting, the burden of proof is on plaintiff. *Simpson v. Gernandt*.... 330

8. Evidence *held* insufficient to establish an oral agreement of partnership. *Simpson v. Gernandt* 330

Pleading. See APPEAL AND ERROR, 25. CARRIERS, 25. GARNISHMENT, 2. JUDGMENT, 3. LIMITATION OF ACTIONS, 4. MASTER AND SERVANT, 22. NEGLIGENCE, 1. TRIAL, 2.

1. Where amendments make a continuance necessary, or increase the costs, such terms should be imposed as are just. *Westrope v. Anderson* 57

2. A petition charging concurrent and inseparable acts of negligence against two physicians *held* good as against a joint demurrer. *Pier v. Cauley* 80

3. Where a general denial was filed in justice's court, in an action for wages, an answer on appeal alleging facts tending to contradict the allegations of the petition that there was a balance due *held* not to change the issues. *Hauenstine v. Barnett* 312

4. Striking reply in district court on appeal from a justice's court *held* error. *Berryman v. Childs* 450

5. Refusal of the district court to permit a reply to an affirmative defense, to which no reply had been filed in the county court, *held* not error. *Von Dorn v. Huntley* 475

6. The rule as to pleadings in the county court, in an action for an amount exceeding the jurisdiction of a justice, is the same as in the district court. *Von Dorn v. Huntley* 475

7. A general denial, in an action in county court for an amount exceeding the jurisdiction of a justice, puts in issue the cause of action stated in the petition. *Von Dorn v. Huntley*.. 475

Pleading—*Concluded.*

8. When an answer in county court, in addition to a general denial, pleads an affirmative defense, such defensive matter, in absence of a reply, will be taken as true. *Von Dorn v. Huntley* 475

9. Refusal to permit a reply to be filed on a day to which the case was continued for argument *held* not an abuse of discretion, in the absence of a showing. *Von Dorn v. Huntley*.. 475

10. An affirmative defense, not assailed by motion or demurrer in the court in which the action originated, will be liberally construed in an appellate court. *Von Dorn v. Huntley*.... 475

11. The same cause of action must be presented and tried on appeal as was tried below; but to plead an issuable fact in the appellate court, not pleaded below, is not necessarily pleading a new cause of action. *Swenson Bros. Co. v. Commercial State Bank* 702

12. Where defendant goes to trial without attacking the reply as being a departure from the petition, he will ordinarily be deemed to have waived such objection. *Hampton v. Lincoln Traction Co.* 839

13. Petition filed in the district court *held* to state the same cause of action as that in justice court. *Burke v. Northup*.. 849

Principal and Agent.

Where an agent makes a contract with his principal in regard to the subject matter of his agency without disclosing all the facts, the principal is not bound by the contract. *Wells v. Cochran* 725

Process. See CORPORATIONS.

Public Lands.

1. The fact that when the devisee of a homestead entryman applied for a patent he failed to present the will, *held* not, in absence of plea and proof of estoppel, to defeat his right to have his title quieted in the state court. *Cole v. Cole*..... 674

2. Under sec. 2291, Rev. St. U. S., *held* that the devisee of a homestead entryman succeeds to his rights. *Cole v. Cole*.... 674

Quo Warranto. See FRAUDULENT CONVEYANCES, 3.

Railroads. See CARRIERS.

1. Damages to realty caused by proper construction of a railroad accrue when the road is built. *Reed v. Chicago, B. & Q. R. Co.* 19

Railroads—*Concluded.*

2. Damages to property from improper construction of a railroad accrue when the damages occur. *Reed v. Chicago, B. & Q. R. Co.* 19

3. Railroad company *held* not required to replace a private grade crossing with an overhead crossing. *Postle v. Chicago, B. & Q. R. Co.* 192

4. Evidence *held* insufficient to require the relocation of a private farm crossing and substitute therefor an overhead crossing. *Postle v. Chicago, B. & Q. R. Co.* 192

5. A railroad company must exercise reasonable care to avoid injuring persons known to be, or who may reasonably be expected to be, upon its right of way. *Krummack v. Missouri P. R. Co.* 773

6. Failure of a railroad company to enclose tracks near a school, and neglect to observe whether children are on the tracks, by reason whereof a trespassing child is injured, *held* actionable negligence. *Krummack v. Missouri P. R. Co.* 773

Sales. See TRIAL, 3.

1. Letters between the parties *held* only a preliminary negotiation, and not a contract of sale. *Nebraska Seed Co. v. Harsh* 89

2. The mere statement of the price at which property is held is not an offer to sell. *Nebraska Seed Co. v. Harsh*..... 89

3. The description in a recorded contract of conditional sale is sufficient, where it will enable a third person, aided by inquiries suggested by the instrument, to identify the property. *Crancer Co. v. Cooper* 153

4. The filing of a contract of conditional sale in the county wherein the purchaser resides protects the seller, though the purchaser removes the property to another county. *Crancer Co. v. Cooper* 153

5. Recovery of the price of personalty sold on condition may be had, though the property was destroyed by fire without the purchaser's fault. *Stickney Co. v. Nicholas* 287

6. There is an implied warranty that an article sold shall be reasonably fit for the purpose for which it is sold. *Underfeed Stoker Co. v. Farmers Co-operative Creamery & Supply Co.* 377

7. A principal who deals in a market will be presumed to deal according to the custom of that market. *Miller v. Great Western Commission Co.* 392

Sales—*Concluded.*

8. The presumption that a person who deals in a market deals according to its custom cannot be rebutted, where the person with whom he deals, without knowing that the other is ignorant of the usage, has performed the contract in accordance therewith. *Miller v. Great Western Commission Co.* 392

Schools and School Districts.

1. Under ch. 28, Laws 1889, *held* that the surety on the contractor's bond was liable for all labor necessarily employed in performing the contract. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.* 27

2. Where a contract for the construction of a school building was entered into before ch. 170, Laws 1913, took effect, the contractor's bond was a common-law contract as to materials furnished. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.* 27

3. A school building contractor's bond *held* to cover only labor and material that enter into the structure or are consumed in and about the work. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.* 27

4. School boards should act impartially in allowing electors an opportunity to express their desire as to a proposed schoolhouse site. *Leavitt v. Matson* 457

5. Evidence *held* not to show such fraud or discrimination as to the site of a proposed schoolhouse as to require that the issuance of bonds be enjoined. *Leavitt v. Matson* 457

Specific Performance. See WILLS, 6.

1. Specific performance is within the discretion of the court, and will not be granted where its enforcement would be unjust. *Edmiston v. Hupp* 84

2. The district court has exclusive jurisdiction of a suit for specific performance of an oral contract to devise property. *Lacey v. Zeigler* 380

3. Where a court of equity can afford complete relief, it may take jurisdiction and decree specific performance of a single contract to devise land and bequeath money. *Lacey v. Zeigler* 380

4. A parol agreement to leave property to adopted children, in consideration for their services, may be enforced, if fully performed by the children. *Hannemann v. Ott* 492

Specific Performance—*Concluded.*

5. The fact that a person promising to leave his property to his children owned a homestead, which was the principal part of his property, *held* not to render the promise unenforceable, as within the statute of frauds. *Hannemann v. Ott* 492

6. The fact that a person promising to leave his property to adopted children had married their mother before the promise was made and, after 20 years, had obtained a divorce and been required to pay her alimony, *held* not to prevent the enforcement of the contract after death. *Hannemann v. Ott* 492

7. In a suit for specific performance of a contract for exchange of properties, *held* that intoxication was not ground for setting aside the contract. *Carroll v. Polfus* 657

Statute of Frauds. See SPECIFIC PERFORMANCE, 5.

Statutes. See CARRIERS, 9, 11. CONSTITUTIONAL LAW. FOOD. FRAUDULENT CONVEYANCES, 1, 2. INDIANS. INSURANCE, 22, 27. INTOXICATING LIQUORS, 4, 8.

1. The legislature may so define words in a statute as to extend their meaning. *In re Arrigo* 134

2. A legislative definition designed to extend a particular word so as to include more than its usual meaning should be so construed as to carry out the purpose of the act. *In re Arrigo* 134

3. An unambiguous statute will be construed according to its terms. *State v. Farmers Irrigation District* 239

4. Where a statute is susceptible of two constructions, one of which presents doubtful constitutional questions, and the other avoids them, the latter construction will be adopted. *Enos v. Hanff* 245

5. Courts will not assume that, in enacting a statute, the legislature intended a construction which might result in confiscation of property, if the statute will admit of a more reasonable construction. *Enos v. Hanff* 245

6. The Gibson act (Laws 1907, ch. 82), restricting the leasing of buildings for saloons, will not be so construed as to unnecessarily destroy property values, it being capable of other construction. *Enos v. Hanff* 245

7. Whether a conveyance of property was made in violation of the Gibson act is for the courts, and not the excise board. *Enos v. Hanff* 245

Statutes—*Concluded.*

8. Though sec. 10 of the initiative and referendum act (Laws 1897, ch. 32) may be invalid, *held* that its invalidity will not invalidate the whole act. *Enos v. Hanff* 245

9. A particular intent expressed in a legislative act, in conflict with a general intent expressed in a later enactment, should be given effect, leaving the later act to operate only outside the scope of the former. *State v. Clarke* 566

10. Statutes *in pari materia* must be construed together. *State v. Clarke* 566

11. In construing a statute, the reason and intention of the law will control the strict letter thereof, when the latter would lead to palpable injustice or absurdity. *State v. Grimes*.. 762

12. Ch. 222, Laws 1915, *held* not a legislative attempt to repeal or amend any prior statute, but a legislative construction of the word "week" as used in statutes relating to publication of legal notices. *In re Estate of Johnson* 799

13. The legislative construction in ch. 222, Laws 1915, of the term "week" superseded the construction previously given by the judiciary. *In re Estate of Johnson* 799

14. A legislative classification under the pure food laws must not be artificial, arbitrary or unreasonable. *In re De Klotz*.. 861

Street Railways. See APPEAL AND ERROR, 27. CARRIERS.

1. Evidence, in an action for injury to a child, *held* to sustain verdict for plaintiff. *Sacca v. Omaha & C. B. Street R. Co*... 73

2. Whether a would-be passenger was negligent in attempting to board a street car before it came to a stop *held* a question for the jury. *Boles v. Lincoln Traction Co.* 405

Subrogation. See INSURANCE, 23.

Supersedeas. See APPEAL AND ERROR, 33, 34.

Taxation. See INTOXICATING LIQUORS, 8.

1. A county board of equalization cannot raise the assessed valuation of realty without a complaint and notice. *Brown v. Douglas County* 299

2. Taxes levied on an illegal increase of valuation of realty may be enjoined. *Brown v. Douglas County* 299

Telegraphs and Telephones.

1. The damages for delay in transmitting a message are such as may be reasonably supposed to have been within the contem-

Telegraphs and Telephones—*Concluded.*

plation of both parties. *Nash Co. v. Western Union Telegraph Co.* 210

2. A telegraph company's knowledge of the importance of a message in cipher may be shown by evidence of facts and circumstances additional to those disclosed by the message. *Nash Co. v. Western Union Telegraph Co.*..... 210

3. Evidence, in an action for damages for delay in transmitting a message, *held* to sustain verdict for plaintiff. *Nash Co. v. Western Union Telegraph Co.*..... 210

Tender.

The rule that, where there is a definite sum due, notwithstanding the defense, there must be a tender thereof, *held* not to apply in an action for damages for personal injuries. *Wunrath v. Peoples Furniture & Carpet Co.*..... 342

Trespass. See ANIMALS.

Trial. See APPEAL AND ERROR. BILLS AND NOTES, 5, 8. CARRIERS, 3, 4, 6, 13, 20, 21. CRIMINAL LAW. DAMAGES, 7. EMINENT DOMAIN. EVIDENCE, 5. INSURANCE, 17, 19. MASTER AND SERVANT, 4, 6-9, 18. NEGLIGENCE, 4, 5. STREET RAILWAYS, 2.

1. Objectionable remarks of counsel in argument which were mere expressions of opinion *held* not to require a reversal. *Rankin v. Northern Assurance Co.* 172

2. Amendment of petition during trial by praying for damages in excess of the sum originally claimed *held* proper. *Neal v. Missouri P. R. Co.* 460

3. A finding that property purchased was as represented *held* to support a judgment disallowing a counterclaim based on fraudulent representations. *Kelley v. Meyer Fruit Co.* 503

4. It is not error to overrule a motion to strike all of an answer, where a part is competent and responsive. *Morrissey v. Wharton* 544

5. The credibility of a witness *held* a question for the jury, though she admitted that she had made statements in conflict with her testimony. *Gibbons v. Chicago, B. & Q. R. Co.* 696

6. Whether a person riding in the automobile of another is engaged in a common enterprise with the latter *held* a question for the jury. *Judge v. Wallen* 154

7. Where plaintiff's evidence was insufficient to sustain his cause of action, *held* not error to direct a verdict for defendant. *Halsted v. Shackelton* 13

Trial—*Concluded.*

8. Where nothing had transpired to indicate that the jurors were unmindful of their sworn duty, defendant was not entitled to an instruction that the jury should not be governed by sympathy for plaintiff. *Copeland v. Omaha & C. B. Street R. Co.* 42
9. The refusal of an instruction that the jury should not be governed by sympathy *held* to be within the discretion of the trial court. *Copeland v. Omaha & C. B. Street R. Co.*.... 42
10. It is not error to refuse an instruction covered by one given. *Welsh v. City of South Omaha* 148
11. It is not error to refuse an instruction where its substance is covered by one given. *Travis v. Omaha & C. B. Street R. Co.* 200
12. The meaning of instructions is determined by considering all that is said on each branch of the case. *Travis v. Omaha & C. B. Street R. Co.* 200
13. Direction of verdict for plaintiff *held* proper, where the evidence supported his cause of action, but was insufficient to sustain the only defense pleaded. *Bullock v. Power-Heafy Coal Co.* 221
14. Refusal of instructions detailing at length transactions and matters which might mislead the jury *held* not error. *Musser v. Musser* 398
15. Where there is but one question of fact upon which the evidence is conflicting, the court may submit such question to the jury and render judgment on their verdict. *Kelley v. Meyer Fruit Co.* 503
16. Where different minds may draw different conclusions as to the negligence of defendant, it is not error to refuse to direct a verdict in his favor. *Morrissey v. Wharton* 544
17. A judgment will not be reversed because a portion of an instruction is not exactly accurate, where the charge as a whole fairly submits the issues. *Morrissey v. Wharton*..... 544
18. An instruction which assumed to determine a question of fact *held* properly refused. *Hanika v. Lincoln Traction Co.* 583
19. Instructions should definitely state the issues. *Hanika v. Lincoln Traction Co.* 583

Vendor and Purchaser.

1. Evidence, in an action for breach of covenant to convey title, *held* to sustain judgment for plaintiff. *Bedell v. Berger* 306

Vendor and Purchaser—*Concluded.*

2. In an action for breach of contract, profits which are in the contemplation of the parties and certain of ascertainment may be recovered. *Roper v. Milbourn* 466

3. Evidence *held* to show that defendant devisees had knowledge of sufficient facts to put them on inquiry as to the rights of plaintiffs under an oral promise to devise. *Hannemann v. Ott* 492

Venue. See APPEAL AND ERROR, 43. COURTS, 2. JUSTICE OF THE PEACE, 1.

Waters. See EMINENT DOMAIN, 1.

1. An irrigation company *held* to be a common carrier of water to a limited degree, and its rates and charges subject to regulation and control. *McCook Irrigation & Water Power Co. v. Burtless* 141

2. The state railway commission has jurisdiction to inquire into the reasonableness of water rates and to regulate the same. *McCook Irrigation & Water Power Co. v. Burtless*.. 141

3. Contracts providing for the use of water for irrigation and for maintenance of the ditch *held* subject to control as to rates by the state railway commission. *McCook Irrigation & Water Power Co. v. Burtless* 141

4. The state railway commission *held* not vested with jurisdiction to settle disputed property rights as to the ownership of an irrigation canal. *McCook Irrigation & Water Power Co. v. Burtless* 141

5. Sec. 3438, Rev. St. 1913, requiring the maintenance of a bridge across an irrigation ditch, *held* to apply where land was purchased subsequently to the construction of the ditch. *State v. Farmers Irrigation District* 239

Wills. See COURTS, 4. EXECUTORS AND ADMINISTRATORS. INDIANS, 4-6. JUDGMENT, 1. LIMITATION OF ACTIONS, 2. PARTITION. PUBLIC LANDS. SPECIFIC PERFORMANCE, 2-6. VENDOR AND PURCHASER, 3.

1. A bequest *held* to vest an unconditional title immediately on testatrix's death, and that the only office of the demand therein specified was to prevent a forfeiture. *Legan v. Smith* 7

2. A widow of one who dies testate in a sister state, who has there elected to renounce the will and take dower, *held* entitled to claim dower in her husband's estate situated in Nebraska. *Mettler v. Warner* 111

Wills—*Continued.*

3. A widow's election in the courts of the state of her husband's domicile *held* the commencement of proceedings for assignment of dower within sec. 18, ch. 23, Comp. St. 1905, and she may sue to have dower assigned in lands in Nebraska when her right thereto is challenged by her husband's heirs. *Mettler v. Warner* 111

4. The district court has original jurisdiction of an action to have a specific bequest declared a lien upon and enforced against realty in the hands of a residuary legatee, though the construction of the will is involved. *Klug v. Seegabarth* 272

5. The intention of the testator to make a bequest a charge on realty may be inferred, where the bequest is followed by gift of the residue of his property in one mass. *Klug v. Seegabarth* 272

6. An oral contract to devise land and bequeath money in consideration of services *held* enforceable, where the beneficiary has performed the services, the value of which cannot be determined by any pecuniary standard. *Lacey v. Zeigler* 380

7. Where an estate is solvent, the district court may certify its finding to the county court as to the amount due, and direct the same to be allowed as an established claim. *Lacey v. Zeigler* 380

8. Evidence *held* to show an indivisable contract to devise and bequeath, for a single consideration, consisting of unusual personal services. *Lacey v. Zeigler* 380

9. Evidence *held* to establish contract to devise property in consideration for services. *Hannemann v. Ott* 492

10. The term "competent witness," as used in sec. 1290, Rev. St. 1913, means a person who, at time of making attestation, can legally testify to the facts which he attests by subscribing the will. *In re Estate of Wiese* 463

11. A devisee may be a competent subscribing witness to a will. *In re Estate of Wiese* 463

12. The question to be decided in a proceeding to probate a will is whether the instrument offered is the decedent's will. *In re Estate of Wiese* 463

13. A trust estate created by a will is not invalidated because the trustee is one of two subscribing witnesses. *In re Estate of Wiese* 463

Wills—*Concluded.*

14. Will construed, and a bequest to the "Swedish Mission Society of Chicago, Illinois," *held* valid as a bequest to the "Swedish Evangelical Mission Covenant in America." *Coyne v. Davis* 763

15. Where a testator directs the sale of specific land to pay bequests, equity will decree conversion of the land into personalty as at testator's death, though the time of sale is postponed. *Coyne v. Davis* 763

16. Whether a devise is on a condition precedent or subsequent will not be determined alone from technical words in the will, but from the intention of the testator gathered from the whole will. *Gotchall v. Gotchall* 730

17. Where the whole will shows that the testator intended that the act upon which a right depends was to be performed before the interest vested, the condition is precedent, and unless the act is performed no interest passes. *Gotchall v. Gotchall* 730

18. Will construed, and *held* that payment of a mortgage on land was a condition precedent to the right to use and occupy the premises. *Gotchall v. Gotchall* 730

19. Under ch. 222, Laws 1915, the publication of notice of the time and place for proving a will, as required by sec. 1303, Rev. St. 1913, begins with the date of the first publication, and ends three weeks thereafter. *In re Estate of Johnson*.. 799

20. An order entered on a hearing had prior to completion of publication of notice of the time for proving a will is void. *In re Estate of Johnson* 799

Witnesses. See BASTARDY, 1. EVIDENCE. TRIAL, 5. WILLS, 10-13.

1. Testimony of a physician as to what "could be" the result of an injury *held* harmless, in view of the other evidence. *Travis v. Omaha & C. B. Street R. Co.* 200

2. A ruling on the competency of a witness to testify to the value of personal property, being discretionary, will not be disturbed unless clearly erroneous as a matter of law. *Meyers & Cox v. Western Union Telegraph Co.* 471

3. The widow of a deceased person *held* competent to testify to transactions and agreements between the deceased and his adopted children, in which she took no part. *Hannemann v. Ott* 492

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